85-1592

Supreme Court, U.S.
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No. .

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS BURKE, ET AL.,
PETITIONER,

v.

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., ET AL.,
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Questions Presented for Review

Whether the Court of Appeals for the First Circuit erred in holding that this Court's decision of *Firefighters' Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S.Ct. 2576 (1984) was inapplicable to a consent decree entered into as a voluntary settlement of claims which includes affirmative action provisions, including promotional goals, designed to increase the number of black sergents in the Boston Police Department.

Whether the Court of Appeals erred in affirming the order of the District Court denying the petitioners' Motion to Intervene for the purpose of moving to vacate a consent decree entered in 1979 where the petitioners were third parties whose eligibility for promotion had been terminated by the consent decree; where the consent decree included an express disclaimer of any violations of Title VII; and where, prior to the filing of the petitioners' Motion to Intervene on July 25, 1984, the consent decree had effectively not been implemented.

Petitioners

Applicants for Intervention - Appellants below: Thomas Burke, Timothy P. Callahan, David Campbell, Keith Carlson, Edward Cavanaugh, Robert Childs, Marcy Corwin, Robert Cunningham, Lawrence Daly, Clifford Dawson, Walter Duggan, Robert Francis, Francis Gaughan, Joseph Griffin, John Jansky, Myles McGrail, David Mackin, Michael McWeeny, William O'Connell, John T. Pels, Eugene F. Simpson, Thomas Steiner, George Symes, John S. Tobin, Joseph Wells, Herbert White, Arthur W. Morgan, Jr., Patricia Rehm-Levitan, and James E. Nugent.

Respondents

Plaintiffs - Appellees below: Massachusetts Association of Afro-American Police, Inc., William Celester, and Roy Howard;

Defendants - Appelles below: Department of Personnel Administration for the Commonwealth of Massachusetts, Boston Police Department.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS BURKE, ET AL.,
PETITIONER,

v.

MASSACHUSETTS ASSOCIATION OF
AFRO-AMERICAN POLICE, INC., ET AL.,
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners Thomas Burke et al. (the "petitioners") respectfully petition this Court, pursuant to 28 U.S.C. § 1254(1) and Rule 19 of the Rules of this Court, for a writ of certiorari to the United States Court of Appeals for the First Circuit in the case of *Massachusetts Afro-American Police, Inc., et al.*, 780 F.2d 5 (1st Cir., 1985).

Opinions Below

The opinion of the Court of Appeals, entered December 20, 1985, is reported at 780 F.2d 5 (1st Cir., 1985) and is set forth in Appendix A. The judgment of the Court of Appeals affirming the order of the District Court is set forth at Appendix B. The Memorandum and Order of the District Court denying the petitioners' Motion to Intervene is set forth at Appendix C.

Jurisdiction

The judgment of the Court of Appeals affirming the order of the District Court was entered on December 20, 1985. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254 (1).

Statutory Provisions

The following statutes are involved in this petition: 42 U.S.C. § 2000e — 2(j) and 42 U.S.C. § 2000e — 5(g), which are set out at Appendix D.

Statement of the Case

The petitioners are police officers of the City of Boston who were certified as eligible for promotion to the rank of sergeant on a list established pursuant to the Civil Service laws of the Commonwealth of Massachusetts in 1979 (the "1979 list").[1]

Prior to the certification of the 1979 list, the respondents Massachusetts Association of Afro-American Police, Inc., William Celester and Roy Howard filed a complaint in the District Court alleging *inter alia* that the respondents Boston Police Department and Department of Personnel Administration had engaged in unlawful employment practices and policies limiting employment and promotional opportunities for black police officers in the Boston Police Department in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*

The parties to the District Court action engaged in settlement negotiations and, on September 16, 1980, a consent

[1] With the exception of Patricia Rehm-Levitan and Arthur W. Morgan, Jr., the petitioners are white males. Arthur W. Morgan, Jr. is black.

decree was approved after hearing and entered as an order of the District Court (the "Consent Decree") (R. p. 91).[2]

The Consent Decree provided that the action be certified as a class action with the class being:

All present and future black sworn officers in the Boston Police Department. The Consent Decree by its terms resolved only those allegations which related to promotions to the rank of sergeant. All other claims were dismissed without prejudice (R. p. 93). The Consent Decree further provided that:

> The consent of the parties shall in no manner constitute findings on the merits of the action, nor shall it be construed as an admission by the defendants of any violation of Title VII, Title VI, 42 U.S.C. §§ 1981, 1983, and 1988 . . .; nor shall it be construed as an admission by the defendants to any of the matters in the complaint filed in this action.

By the terms of the Consent Decree, it was ordered that only twenty-five officers from the 1979 list would be promoted to the position of sergeant (R. p. 94).[3] The Consent Decree required that the respondent Boston Police Department "maintain sufficient vacancies in the rank of sergeant to comply with the goals referred to in paragraph 7 of this Decree" (R. p. 94.)

The Consent Decree contemplated that following promotions from the 1979 list, there would be annual promotions for the life of the Decree, *i.e.* through September 16, 1985, and that the Commissioner of the Boston Police Department

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[2] The reference "R. p." refers to the record appendix before the United States Court of Appeals for the First Circuit.

[3] The petitioners were those officers who were not among the twenty-five officers promoted according to the terms of the Consent Decree (R. p. 129).

"shall" make those appointments in accordance with the goals and timetables set forth in Appendix B of the Consent Decree (R. p. 96, 114).[4]

Following the appointment of twenty-five officers from the 1979 list, no promotional examinations were held for the position of sergeant (R. p. 129).[5] On March 16, 1983, twenty-four officers were promoted as acting or provisional sergeants. Officers so promoted were not selected from a list established under the Civil Service laws, but rather from a list established by the then Commissioner of the Boston Police Department of officers "suitable, qualified and deserving of a promotion to acting sergeant" (R. p. 184-185).[6]

Procedural History

The complaint was filed in the District Court on March 2, 1978. On September 16, 1980, after notice and a hearing, the Consent Decree was approved by the district court. From September 16, 1980 through the date of filing of the petitioners' Motion to Intervene, the only proceedings held in the district court related to the award of attorneys fees and costs (R p. 4-5).

On June 12, 1984, this Court decided *Firefighters' Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S.Ct. 2576 (1984). On July 25, 1984, the petitioners filed a Motion to Intervene, asserting that they had been impaired or impeded in protecting their interest in continued eligibility for pro-

[4] Since the decision of the Court of Appeals, the Consent Decree has been extended.

[5] A promotional examination was held on June 1, 1985 after the petitioners' Motion to Intervene had been denied.

[6] In March of 1983, promotions of lieutenants (which were not subject to a consent decree) were made from an eligible list which had been reactivated and exhausted (R. p. 153).

motion by the Consent Decree, particularly in light of the *Stotts* decision, and that they had been prejudiced by the Consent Decree in that the Boston Police Department had appointed acting sergeants to the vacancies which existed rather than having appointed from the 1979 list (R. p. 124-127).

On May 28, 1985, after hearing, the District Court denied the petitioners' Motion to Intervene, holding that the *Stotts* decision was limited to the facts addressed therein and, since there were no layoffs involved with respect to the petitioners' claims, *Stotts* is inapplicable (A.17, A.18).

The petitioners appealed to the Court of Appeals. On December 20, 1985, the Court of Appeals affirmed the order of the District Court, following its decision in *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985), *U.S. App. Pndg.* (A. 8).

Reasons for Granting the Writ

Although *Firefighters' Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S.Ct. 2576 (1984), presented the narrow issue of whether the court had the authority to modify a Title VII consent decree to override a seniority system with respect to layoffs, "the manner in which the Court resolved it has potentially sweeping implications for the validity of affirmative action both when undertaken through consent decree and when ordered as a result of litigation." *Leading Cases of the 1983 Term*, 98 Harvard Law Review 267, 267-268.

This petition involves the applicability of *Stotts*, to a settlement agreement relating to promotions of black police officers which was embodied in a consent decree. That Consent Decree includes an express disclaimer of actual discrimination under Title VII. It also includes various race-conscious affirmative action provisions (including promotional goals) which were intended to increase the number of black officers promoted to sergeant in the Boston Police Department.

The primary factor precipitating the filing of the Motion to Intervene was this Court's decision in *Stotts* which raised doubts concerning the validity of the Consent Decree under 42 U.S.C. § 2000e-5(g) since there was no finding that the respondents had "intentionally engaged in" the unlawful employment practices as alleged in the Complaint and since the affirmative action provisions were not limited to actual victims of discrimination. The petitioners also sought to bring to the attention of the District Court that the Consent Decree had not been implemented by the parties to the action according to its terms.

In its decision, the Court of Appeals acknowledged the continuing legal argument relating to affirmative action in the wake of *Stotts* (A. 6). However, the Court of Appeals was reluctant to extend the ruling of *Stotts* to consent decrees governing promotional practices in law enforcement agencies. Rather the Court of Appeals chose to follow its prior decision in *Deveraux*.

In *Deveraux*, the Court of Appeals was also faced with a consent decree relating to promotions. The Court of Appeals listed several reasons in *Deveraux* for holding that *Stotts* did not make the consent decree's affirmative action requirement unlawful, including that 1) the *Deveraux* decree did not conflict with a bona fide seniority plan; 2) that the district court had not ordered changes to the decree over a party's objection but simply enforced the original terms of a decree to which all parties had voluntarily agreed; 3) the *Deveraux* decree provisions, at least arguably, were more like those which *United Steelworkers v. Weber*, 443 U.S. 193 (1979) protected; and 4) that the defendant had admitted prior Title VII violations. *Deveraux v. Geary*, 765 F.2d at 272-273.

The petitioners had attempted to distinguish this Consent Decree from that considered in *Deveraux* upon the fact that the Consent Decree in this case included a disclaimer of Title VII violations and involved third-parties whose eligibility for

promotion was terminated to accommodate the minority. *See, Turner v. Orr,* 759 F.2d 817 (11th Cir. 1985). The Court of Appeals concluded that the fact that this Consent Decree included a disclaimer of Title VII violations was not necessary to uphold the validity of the Consent Decree.

The Consent Decree was designed to create vacancies for members of the class of present and future black police officers who would become eligible during the life of the Consent Decree. To accomplish this purpose, the Decree provided that only twenty-five of those persons certified eligible on the 1979 List would be promoted, thereby terminating the continuing eligibility of those on the 1979 List who were not among the twenty-five officers promoted. Thereafter, the Decree contemplated annual examinations with appointments to be made in accordance with the goals set forth at Appendix B of the Consent Decree. The goals were based upon a percentage of the number of black sergeants to the total number of sergeants in the work force of the Boston Police Department. *See,* 42 U.S.C. § 2000e-2(j).

The Consent Decree effectively created a preference generally for black officers who would subsequently qualify for promotion. That preference would be based merely on membership in a disadvantaged class. As noted in *Stotts,* "mere membership in the disadvantaged class is insufficient to warrant a seniority award, each individual must prove that the discriminatory practice had an impact on him." *Firefighters' Local Union No. 1784 v. Stotts,* ___ U.S. ___, 104 S.Ct. at 2688 *citing Teamsters v. United States,* 431 U.S. 324 at 367-371.

The authority to adopt a consent decree comes only from the statute which the decree was intended to enforce. *Id.,* 104. S.Ct. at 2587, n. 9. Since a consent decree is a court order enforceable through contempt proceedings, it is distinguishable from a voluntary affirmative action plan adopted by a private employer under *United Steelworkers v.*

Weber, 443 U.S. 193 (1979). *See Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 492 (6th Cir. 1985) (dissenting opinion), *Cert. granted sub nom., Local No. 93, International Ass'n. of Firefighters, AFL-CIO v. City of Cleveland*, 106 S.Ct. 59 (October 7, 1985) 42 U.S.C. § 2000e-5(g), on its face, specifically requires that a finding by the court that the respondents either have intentionally engaged in or are intentionally engaging in unlawful employment practices.

If, in fact, this Court intended to change the interpretation of Title VII to require a finding of actual discrimination in any affirmative action case, this Court must so state since the Courts of Appeal have been reluctant to so extend *Stotts*. *See, Vanguards of Cleveland v. City of Cleveland*, 753 F.2d at 486-487; *Diaz v. American Telephone and Telegraph*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157-1158 (6th Cir. 1984), *Cert. granted*, ____ U.S. ____, 105 S.Ct. 2015 (April 15, 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *Cert. denied*, 105 S.Ct. 782 (1985); *cf. EEOC v. Local 638*, 753 F.2d 1172, 1186 (2d Cir.) *Cert. granted sub nom., Local 28 of Sheet Metal Workers' International Ass'n. v. EEOC*, ____ U.S. ____, 106 S.Ct. 58 (October 7, 1985); *Grann v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *Cert. denied*, ____ U.S. ____, 105 S.Ct. 296 (1984).

The remedy which a consent decree may provide cannot exceed the authority conferred by statute. *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. at 2587. The policy of Title VII is to provide "make-whole relief only to those who have been actual victims of illegal discrimination. *Id.*

Thus, it is questionable whether the District Court exceeded its authority under 42 U.S.C. § 2000e-5(g) by approving a decree which embodied percentage goals for promotions of black officers based merely on their membership in the class of all present and future black officers of the Boston Police Department while disclaiming past discriminatory promotional practices.

The petitioners have also asserted that they are the "third parties" who were injured by the Consent Decree. *See Turner v. Orr,* 759 F.2d 817 (11th Cir. 1985). The Consent Decree was entered after the petitioners were certified as eligible for promotion. Their continuing eligibility for promotion was "bargained away" at the time the Decree was entered. With the exception of appointing the twenty-five officers from the 1979 List, the Decree was not implemented for almost five years.

In 1983, there were at least twenty-four vacancies. Those vacancies were filled with "acting sergeants" who were not selected in accordance with the Consent Decree or with the Civil Service laws of the Commonwealth.

Although it has been held that relief authorized to be given actual victims under Title VII does not include "bumping" employees previously occupying jobs, see *Firefighters' Local No. 1784 v. Stotts,* 104 S.Ct. at 2588, n. 11, the petition raises the question whether vacancies can be maintained over an extended period of time for the benefit of minority officers. A remedial plan embodied in a consent decree is subject to continuing oversight by the court to assure that it will work the least possible harm to others competing for the benefits. *Regents of University of California v. Baake,* 438 U.S. 301, 302 (1978).

Conclusion

"In the end, the most disturbing feature of the *Stotts* opinion is the legal uncertainty that it leaves in its wake." 98 Harvard Law Review, at 277. The uncertainty was acknowledged by the Court of Appeals but left to this Court for resolution. In light of the uncertainty created by *Stotts,* this petition should be granted to resolve those uncertainties as they relate to affirmative action consent decrees relating

to promotions and to the rights of third parties who have been adversely affected by such consent decrees.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85-1453

MASSACHUSETTS ASSOCIATION
OF AFRO-AMERICAN POLICE, INC.,
ET AL.,
Plaintiffs, Appellees,

v.

THE BOSTON POLICE DEPARTMENT, ET AL.,
Defendants, Appellees;

BOSTON POLICE DETECTIVES
BENEVOLENT SOCIETY,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS,
(Hon. John J. McNaught, U.S. District Judge)

Before
Coffin and Breyer, *Circuit Judges,*
and Wyzanski, *Senior District Judge**

Regina L. Quinlan for appellants.
Jonathan M. Albano with whom John F. Adkins,
Bingham, Dana & Gould, and Barbara Arnwine
were on brief for appellee Massachusetts Association of

Afro-American Police, Inc.

Leonard G. Learner, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, was on brief for appellee Department of Personnel Administration.

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*Of District of Massachusetts, sitting by designation.

December 20, 1985

BREYER, Circuit Judge. A group of Boston police officers appeal the district court's denial of their motion to intervene in *Massachusetts Association of Afro-American Police, Inc. (MAAAP) v. The Boston Police Department,* Civ. Action No. 78-529McN (filed March 2, 1978), a case in which black police officers attacked the Boston Police Department's promotion practices as illegally discriminatory. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (as amended). The appellants sought intervention in order to attack the *MAAAP* consent decree, entered in 1979, which contained various affirmative action provisions designed to increase the number of black officers promoted to sergeant. Appellants' motion to intervene rests upon their claim that the law has changed significantly since the decree was entered. They believe that the recent Supreme Court case of *Firefighters' Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576 (1984), now makes clear that Title VII court decrees that require an employer to favor minority over nonminority employees are unlawful, unless the favored employees themselves had been previous, actual victims of illegal discrimination.

We recently considered, and rejected, this same claim in a similar case with a similar decree imposing similar affirmative action promotion requirements upon the Metropolitan

District Commission (MDC) — another Boston area law enforcement agency. *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985). The dispositive legal question before us now is whether this case differs significantly from *Deveraux*. The only distinguishing feature to which appellants point is the fact that the consent decree in *Deveraux* contained a stipulation that the MDC had previously violated Title VII, while here the Boston Police Department made no such concession. We find that this distinction is not determinative.

We listed several reasons in *Deveraux* for believing that *Stotts* did not make the decree's affirmative action requirement unlawful: 1) The *Stotts* decree directly conflicted with "a bona fide seniority . . . system," 42 U.S.C. § 2000(e)-2(h); the *Deveraux* decree did not. 2) The *Stotts* district court had ordered changes to the decree over a party's objection; the *Deveraux* district court simply enforced the original terms of a decree to which all parties had voluntarily agreed. 3) The *Stotts* decree changes (being involuntary) fell outside the scope of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (holding that Title VII does not forbid private employers from voluntarily entering into affirmative action plans to eliminate manifest racial imbalance); the *Deveraux* decree provisions, at least arguably, were more like those which *Weber* protected. 4) As appellants correctly point out, we also said that in *Stotts* the defendant had not admitted prior Title VII violations, while in *Deveraux* the MDC had. Our rereading of *Deveraux*, however, convinces us that this final distinction (which we there called "a further distinction,") is not necessary to the result.

For one thing, the first three distinctions are strong ones. For another thing, the cases from other circuits which we relied upon in reaching the *Deveraux* result, for the most part do not rely upon the fourth distinction. *See Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 486-87 (6th Cir. 1985), *cert. granted sub nom. Local No. 93, International*

Ass'n. of Firefighters, AFL-CIO v. City of Cleveland, 106 S.Ct. 59 (October 7, 1985); *Diaz v. American Telephone and Telegraph,* 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken v. Young,* 750 F.2d 43, 45 (6th Cir. 1984); *Wygant v. Jackson Board of Education,* 746 F.2d 1152, 1157-58 (6th Cir. 1984), *cert. granted,* 105 S.Ct. 2015 (April 15, 1985); *Kromnick v. School District of Philadelphia,* 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied,* 105 S.Ct. 782 (1985); *cf. EEOC v. Local 638,* 753 F.2d 1172, 1186 (2d Cir.) *cert. granted sub nom. Local 28 of Sheet Metal Workers' International Ass'n. v. EEOC,* 106 S.Ct. 58 (October 7, 1985); *Grann v. City of Madison,* 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied,* 105 S.Ct. 296 (1984).

Finally, here and in *Deveraux,* the underlying cases involved a complaint of Title VII violation; a voluntary settlement of the complaint; and a consent decree that (arguably) favors minority employees not themselves actual victims of discrimination. While we are aware of the continuing legal argument about 'affirmative action,' *Wygant v. Jackson Board of Education, supra, (cert. granted); Vanguards of Cleveland v. City of Cleveland, supra (cert. granted); EEOC v. Local 28, supra, (cert. granted),* we are not aware of any convincing legal theory that would resolve that argument on the basis of whether the parties had bothered to negotiate an 'admission' as part of their consensual settlement of the suit. Thus, we find *Deveraux* dispositive of the present appeal.

Appellants have asked us to wait to decide this appeal until the Supreme Court has decided *Wygant,* supra. We decline to do so. A delay to await clarification of the law could be lengthy, for *Wygant* may not be dispositive of this, rather different, affirmative action provision. And, the Court has before it other requests to review affirmative action in cases not yet briefed or argued. At the same time, delay could inhibit efforts by the Boston Police Department to implement a non-discriminatory promotion examination, developed as a

result of other, related portions of the decree; it would make more difficult the Department's administrative tasks; and it could injure those who might be promoted under any lawful employment system. Under these circumstances, we believe it appropriate simply to apply what is existing law in this circuit.

The judgment of the district court is Affirmed.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION
OF AFRO-AMERICAN POLICE,
INC., et al,
Plaintiffs,

v.

CIVIL ACTION
NO. 78-529-Mc

THE BOSTON POLICE
DEPARTMENT, et al,
Defendants.

MEMORANDUM AND ORDER

May 28, 1985

McNAUGHT, D.J.

The applicants for intervention have filed a motion, Document 55, pursuant to Fed. R. Civ. P. 24 (a) for leave to intervene as defendants in this action in order to move that the consent decree between the existing parties approved by this Court on September 16, 1980 be vacated and that the applicants for intervention be made whole by an order that they be promoted to the permanent position of sergeant in the Boston Police Department. Both the plaintiffs, the Massachusetts Association of Afro-American Police, Inc., et al., and the defendants, the Boston Police Department, et al., have opposed the motion to intervene and have filed a motion, Document 68, to continue the consent decree for five years

until September 16, 1990 and to permit the parties to modify the goals, timetables, factual background and statistics in the decree in order to reflect the demographic changes in the Boston Police Department during the past five years. The Boston Police Patrolmen's Association and the Boston Police Detectives Benevolent Society have also filed motions, Document 75 and Document 80 respectively, pursuant to Fed. R. Civ. P. 24(a), for leave to intervene for the purpose of objection to the extension of the existing consent decree. Finally, both the parties oppose the motions of the Boston Police Patrolmen's Association and the Boston Police Detectives Benevolent Soceity to intervene.

On March 2, 1978, the plaintiffs, the Massachusetts Association of Afro-American Police, Inc. ("MAAAP"), filed the complaint in this action alleging that the defendants, the Boston Police Department ("Department") et al., were engaged in employment discrimination based on race and color in violation of, *inter alia,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. @ 2000 *et seq.* After more than two years of extensive negotiations, the parties reached agreement on a proposed consent decree. Notice of the proposed decree was provided to the plaintiffs, as well as to four white Boston Police Department officers who had moved to intervene to protect their interest in being promoted to the position of sergeant. Three of those officers are also presently applicants for intervention. On July 9, 1980, this Court denied their first motion to intervene; the denial was not appealed. On that same date, the parties entered into the consent decree at issue here, which was approved by this Court on September 16, 1980.

The consent decree provided for the establishment of validated promotional procedures, the implementation of the Department's pre-existing affirmative action plan and the establishment of goals and timetables for the promotion of blacks to the position of sergeant. Furthermore, the consent

decree provided that the Department would promote no more than twenty-five officers from the then-existing eligible list as established in March of 1979 to permanent positions of sergeant. As to promotional tests, the decree stated that the Department should not use tests for the purpose of selecting police officers for promotion unless such tests are validated in accordance with the "Uniform Guidelines on Employee Selection Procedures," 29 C.F.R. @ 1607.1 *et seq.*, or otherwise shown to have no discriminatory impact. In addition, the decree required the Department to provide all eligible applicants opportunity for training before promotional tests, to ensure minority applicants equal access to such training, and to post notice of forthcoming promotional exams at least sixty days in advance. Consent Decree at 4-6. Finally, the consent decree was to terminate after five years from its entry unless any party moved for its continuation on the ground that its objectives had not been fully achieved. Consent Decree at 7.

As a result of the recent Supreme Court decision of *Firefighters Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S.Ct. 2576, 81 L. Ed. 2d 483, 52 U.S.L.W. 4767 (June 12, 1984), the applicants for intervention ("applicants") moved to intervene on July 25, 1984 in order to vacate the consent decree. It is their contention that *Stotts* "held that the remedial authority of the trial court under Title VII is limited to actual victims of defendants (sic) unlawful discrimination, *Id.* at 2588," and that therefore "the Court lacked subject matter jurisdiction under that Title to adopt the Consent Decree absent a finding that any of the plaintiffs had been a victim of defendants (sic) discrimination." (Applicants' Memorandum in Support of Motion to Intervene at 8) Such a reading of *Stotts* is far too broad. The issue in *Stotts* was much narrower: whether a court may enjoin a city from following its seniority system in determining who must be laid off as a result of a budgetary shortfall where a consent

decree between the city and the firefighters addressed only hiring and promotional practices. The Supreme Court concluded that such an injunction could not be justified, either as an effort to enforce the consent decree or as a valid modification. *Stotts*, ____ U.S. ____, 104 S.Ct. at 2586. In so holding, the Court reaffirmed its ruling in *Teamsters v. United States*, 421 U.S. 324 (1977), that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination. *Id.*, at ____ U.S., ____, 104 S.Ct. at 2589. The holding of *Stotts* cannot be extended beyond its rather narrow fact pattern.

As Judge Mazzone noted in the recent decision *Deveraux v. Geary*, 596 F. Supp. 1481 (D. Mass. 1984), in analyzing the impact of *Stotts* on Title VII law:

> Had the Court meant to rewrite Title VII law to mean that all affirmative action programs are improper absent a finding of actual past discrimination, it would have said so here. *See Culbreath*, 630 F.2d at 23, *citing United States Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed. 2d 480 (1979); *University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 2d 750 (1978); *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980); *Boston Chapter NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed. 2d 775 (1975); *Associated General Contractors of Massachusetts, Inc., v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed. 2d 307 (1974). The clear implication of the above language (that "it is reasonable to believe that the "remedy", which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, at least absent some express provision to that effect," *Stotts*, ____ U.S. ____, 104 S.Ct. at 2586) is that the actual remedy that was provided by the decree was valid and did not exceed the bounds of Title VII, although the subsequent displacement of white employees was invalid.

Deveraux v. Geary, 596 F. Supp. at 1486. That cogent analysis of *Stotts* rightly limits its application to the set of facts addressed therein.[7] In the present case, since there is no issue of any layoffs made in violation of a bona fide seniority system, *Stotts* is inapplicable.

Although there are no layoffs in the case at bar, the applicants for intervention attempt to fit into the *Stotts'* fact pattern by characterizing themselves as having a strong interest in seniority rights and upward job mobility. They, like all other police officers, hope to be promoted. But hopes are often elusive and the hope of being promoted is merely that; it is not a seniority right. The consent decree at issue here was designed to remove all vestiges of discrimination from the process of promoting police officers; as such it does not affect seniority rights of officers who hope to be promoted in the future.

As there is therefore no basis for intervention, it is unnecessary to discuss whether the motion for intervention would meet the test for timeliness as articulated in *Stallworth v. Monsanto*, 558 F.2d 257 (5th Cir. 1977) and adopted by the First Circuit in *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980). Accordingly, the motion of the applicants for intervention for leave to intervene as defendants in this action is denied.

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[7] *See also Vanguards of Cleveland v. City of Cleveland*, No. 83-3091 (6th Cir. January 23, 1985) (*Stotts* has no effect on voluntary affirmative action plans embodied in consent decrees.); *Equal Employment Opportunity Commission v. Local 28, No. 1106* (2nd Cir. January 16, 1985) (distinguishing case from *Stotts* based on fact that *Stotts*" discussion of @ 706(g) related only to "make whole" relief and not to prospective relief such as in the affirmative action plan at issue there); *Aken v. Young*, No. 82-1570 (6th Cir. December 13, 1984) and *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984) (*Stotts* did not overrule *Weber's* refusal to condemn voluntary, race-conscious affirmative action plans.); *Britton v. South Bend Community Corp.*, 593 F.Supp. 1223, 1230-31, n.4 (N.D. Ind. 1984) (*Stotts* is inapplicable to voluntary affirmative action programs.)

Finally, both the plaintiffs and the defendants have filed a motion pursuant to P13 of the consent decree that the Court modify and continue the decree. As grounds therefor, both parties state that P13 of the consent decree entered in this case on September 16, 1980 provides in pertinent part that:

> The Decree shall terminate after 5 years from its entry unless any party has moved for its continuation on the ground that the objectives of the Decree have not been fully achieved. The Court will thereupon determine whether or not the Decree will be dissolved.

It is premature, four months before the consent decree is currently scheduled to be terminated, for the Court to determine whether or not the objectives of the decree have been fully achieved. The Court therefore declines at the present time to grant or deny the motion of the parties. At a later, more appropriate time, the motions may be renewed.

Appendix C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85-1453

MASSACHUSETTS ASSOCIATION
OF AFRO-AMERICAN POLICE, INC.,
ET AL.,
Plaintiffs, Appellees,

v.

THE BOSTON POLICE DEPARTMENT, ET AL.,
Defendants, Appellees;

BOSTON POLICE DETECTIVES
BENEVOLENT SOCIETY,
Appellant.

JUDGMENT

Entered: December 20, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now ordered adjudged and decreed as follows: The order of the district court is affirmed.

By the Court:
Francis P. Scigliano
Clerk.

Appendix D

42 U.S.C. § 2000e-2(j)

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin or such individual or group on account of an imbalance which may exist with respect to the total number or percentage or persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any communtiy, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub. L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

42 U.S.C. § 2000e-5(g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the

court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Supreme Court, U.S.
FILED
APR 29 1986
SPANIOL, JR.
CLERK

No. 85-1592.

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS BURKE, ET AL.,
PETITIONER,

v.

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., ET AL.,
RESPONDENTS.

Brief in Opposition to a Petition for Writ of Certiorari

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Questions Presented for Review

1. Whether petitioners have asserted any interest in the underlying case which would warrant intervention pursuant to Fed. R. Civ. P. 24(a) more than six years after the commencement of the case and over four years after entry of a consent decree resolving all claims raised therein.

2. Whether petitioners' motion to intervene was properly denied as untimely under Fed. R. Civ. P. 24(a).

3. Whether petitioners' interests in the underlying case are adequately represented by the existing parties.

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No. 85-1592.

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS BURKE, ET AL.,
PETITIONER,

v.

MASSACHUSETTS ASSOCIATION OF
AFRO-AMERICAN POLICE, INC., ET AL.,
RESPONDENTS.

Brief in Opposition to a Petition for Writ of Certiorari

Opinions Below

Respondents agree with the identification of the opinions below stated by petitioners, but note that the opinion of the District Court is reported at 106 F.R.D. 80 (D. Mass. 1985).

Statutory Provisions

In addition to the statute identified by petitioners, M.G.L. c. 31, §§ 25 and 31 (West 1979) are relevant to this petition.

Statement of the Case

Petitioners commenced this action on March 2, 1978 against the Boston Police Department (the "Department")

and various State and local officials. The Complaint alleged that defendants had engaged in employment discrimination based on color in promoting police officers to supervisory positions in the Department in violation of, *inter alia*, the Civil Rights Act of 1871, 42 U.S.C. § 1983; the Civil Rights Act of 1870, 42 U.S.C. § 1981; 42 U.S.C. § 1988; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, as amended by the Equal Employment Opportunity Act of 1972; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). See Appendix to Respondents' Opposition to Petition for Writ of Certiorari ("Respondents' App.") at 21-45. Commencement of the case attracted significant attention in the local media. Respondents' App. at 74-79.

Defendants' Answers to the Complaint and the terms of the consent decree later entered in the case established that a gross racial imbalance existed in the Department's workforce at the time action was brought.[1]

In 1979, subsequent to the commencement of the suit, the Massachusetts Department of Personnel Administration

[1] As of March 2, 1978, when the action was commenced, approximately 111 (or 5.5%) of the estimated 2,232 sworn officers in the Department were Black. At the same time, the population of the city of Boston was approximately 20% Black. Respondents' App. at 4. Only one (or .45%) of the 222 sergeants in the Department was Black. Two other Blacks held the permanent civil service rank of sergeant and were members of the Command Staff, in positions exempt from Civil Service. Respondents' App. at 10. Of the approximately 50 lieutenants and 25 captains in the Department, there were no Blacks. Respondents' App. at 4. Further, there were no Black officers assigned to the Homicide, General Investigations (robbery), Hackney, or Organized Crime Units. Of the approximately 20 to 30 officers assigned to the Vice Unit, there was only one Black officer. There were no Blacks among approximately 30 detective sergeants and none among approximately eight detective lieutenants. None of the four superintendents in the Department was Black and only two of the deputy superintendents in the Department were Black. There were no Black officers holding provisional promotions at the time the action was commenced. Respondents' App. at 31-32; 51; 60-61; 83.

("DPA"), then a defendant in the case, promulgated a list of police officers who had passed a promotional examination for the position of sergeant conducted by the Department in 1977 (the "1979 Eligibility List"). Respondents' App. at 72. Those police officers on the 1979 Eligibility List thus were eligible for promotion to Sergeant. *Id.* Under Massachusetts civil service law, the 1979 Eligibility List was to expire in 1981. Respondents' App. at 80-82.

Over two years after the action was commenced, the parties reached agreement on a proposed consent decree. Notice of the proposed decree was provided to the plaintiff class and, in addition, to four police officers who had moved to intervene in the case (including three of the petitioners).[2] *See* Petitioners' Appendix ("Petitioners' App.") at 7.

On September 16, 1980, the District Court approved a consent decree entered into by the parties which resolved all of the claims in the case (the "Decree"). Entry of the Decree received considerable publicity. *Id.*; Respondents' App. at 74-79.

A. The Terms of the Decree

The Decree provided that future promotional exams conducted by the Department were to be validated in accordance with the "Uniform Guidelines on Employee Selection Procedures" 29 C.F.R. § 1607.1, *et seq.* (1985) (the "Guidelines") or tests otherwise shown to have no discriminatory impact. The Decree also provided that the Department would promote no more than 25 officers from the then-existing (and non-validated) 1979 Eligibility List. Respondents' App. at 5-6.

Appendix B to the Decree established promotional goals and timetables for promotions to sergeant within the Depart-

[2] On July 9, 1980, their motion to intervene was denied by the District Court, an order from which they did not appeal. Petitioners' App. at 7.

ment. The Decree did not establish any racial quotas, however, stating instead that:

> [t]he parties agree that the obligation of the Department is to make a good faith effort to reach these goals and that these goals have been set in anticipation of having a sufficient number of black officers to be promoted from lists based on validated tests.

Respondents' App. at 13.

Under its original terms, the Decree was to expire five years from the date of its entry. Respondents' App. at 7-8. The first validated exam conducted pursuant to the Decree was not administered until June 1985, however, almost five years after the Decree was entered. On October 31, 1985, therefore, the District Court ordered that the Decree be extended an additional five years. Respondents' App. at 1-2.

During the first four years of the Decree, the Department had made certain temporary "provisional appointments" to sergeant pursuant to Massachusetts civil service law. Respondents' App. at 72; 83. The Decree did not call for any such provisional appointments to be made. Respondents' App. at 3-20.

On July 25, 1984, over six years after the action was commenced and over four years after the entry of the Decree, petitioners moved to intervene in the case in order to vacate the Decree in light of *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). Respondents' App. at 66-68. The motion was filed prior to the administration of the first validated exam under the Decree and prior to the promotion of any officers — Black or White — pursuant to the Decree. Respondents App. at 1-2.

On May 28, 1985, the District Court denied petitioners' motion to intervene in a Memorandum and Order. 106 F.R.D. at 80. Petitioners appealed to the United States Circuit Court of Appeals for the First Circuit. On December 20, 1985, the Circuit Court affirmed the District Court's Order. 780 F.2d 5 (1st Cir. 1985).

Reasons for Denying the Writ

A. Petitioners Have Not Asserted any Interest Which Warrants Intervention Under Fed. R. Civ. P. 24(a).

Petitioners sought intervention on the grounds that they "had been impaired or impeded in protecting their interest in continued eligibility for promotion by the Consent Decree, particularly in light of the *Stotts* decision, and that they had been prejudiced by the Consent Decree in that the Boston Police Department had appointed acting sergeants to the vacancies which existed rather than having appointed from the 1979 [Eligibility List]". Petition at 5.[3]

Petitioners do not claim that the Decree deprived them of promotions to which they were entitled; nor do they allege that minority officers were promoted ahead of them as a result of the Decree. They simply complain that: (1) the Decree limited the number of persons who *might* have been promoted from the 1979 Eligibility List; and (2) the Department made provisional appointments to sergeant prior to conducting the first promotional exam pursuant to the Decree.

The Decree's limitation on the number of persons the Department could promote from the 1979 Eligibility List did not impair any protectable interest of petitioners, however.

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[3] To the extent the instant Petition seeks guidance from the Court concerning the import of the *Stotts* decision (Petition at 9), the Court's forthcoming decisions in *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015 (1985); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted*, ___ U.S. ___, 106 S.Ct. 59 (1985); and *Equal Employment Opportunity Commission v. Local 638*, 753 F.2d 1172 (2d Cir.), *cert. granted*, ___ U.S. ___, 106 S.Ct. 58 (1985) will provide the Court with the opportunity to do so, if appropriate. The interpretation of the *Stotts* decision is therefore not a "special and important" reason for granting the instant Petition. Sup. Ct. R. 17.

Under Massachusetts law, a person whose name has been placed on an eligibility list does not have the right to insist that it retain its place on the list. *McCue v. Director of Civil Service*, 325 Mass. 605, 608, 91 N.E.2d 761, 763 (1950). *Cf. Burns v. Sullivan*, 619 F.2d 99, 104 (1st Cir.), *cert. denied*, 449 U.S. 893 (1980) (qualified nature of expectation of promotion held by person on Massachusetts eligibility list does not rise to the level of constitutionally protected interest). Moreover, even if petitioners did have a protectable interest in ensuring that the 1979 Eligibility List remained in use, the only prejudice which they suffered as a result of the Decree is that they were required to pass a new, validated promotional exam before being certified as eligible for promotion again.

Similarly, the Department's temporary promotions of provisional sergeants did not provide petitioners with any grounds for intervention in that:

1. The Decree did not call for the provisional appointments to be made.

2. The provisional appointments were made in 1983. Respondents' App. at 72. The 1979 List — even absent the entry of the Decree — expired under state law in 1981. Respondents' App. at 80-82.

3. Although under M.G.L. c. 31, § 25 the Administrator of the DPA had the statutory discretion to extend the 1979 List beyond its two year life, petitioners had no legitimate or protectable expectation that, absent the Decree, the Administrator would have exercised that discretion. Respondents' App. at 80-82.

4. Even if the 1979 list was extended, petitioners would not be ensured of a promotion. Indeed, none of them were among the first 25 persons promoted from the List in 1980.

5. Being placed on the 1979 Eligibility List did not vest petitioners with any right to be promoted, *Burns*, 619 F.2d at 104, or any right to retain a place on the List, *McCue*, 325 Mass. at 608, 91 N.E.2d at 763.

B. PETITIONERS' MOTION TO INTERVENE WAS UNTIMELY AND THUS PROPERLY DENIED.

Fed. R. Civ. P. 24(a) requires that motions to intervene must be timely in order to be granted. *See National Association for the Advancement of Colored People v. New York*, 413 U.S. 345, 365 (1973). In order to determine whether a motion to intervene is timely, courts must consider: (1) the length of time the movants knew or reasonably should have known of their interest before seeking to intervene; (2) the prejudice to existing parties caused by the movants' failure to promptly seek intervention; (3) the prejudice to movants if intervention is denied; and (4) unusual circumstances militating for or against intervention. *Garrity v. Gallen*, 697 F.2d 452, 455 (1st Cir. 1983); *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980). Petitioners' motion to intervene is untimely under that test.

(i) Petitioners knew or should have known of their interest long before they sought intervention

All of the petitioners have been employed by the Department since at least 1977. Respondents' App. at 72. (Indeed, three of the petitioners sought to intervene in 1980 and did not appeal the denial of that motion. Petitioners' App. at 7). The institution of the action and the proposed settlement received extensive local media coverage. Respondents' App. at 74-79.

Petitioners thus surely knew of, or should have known of, their asserted interest in this case years before their motion to intervene was filed in July of 1984. *Cf. Garrity*, 697 F.2d at 476.

(ii) The existing parties to the case will be severely prejudiced if intervention was now allowed

To allow petitioners to intervene after delaying so long to assert their interests would deny the relief sought by plain-

tiffs and agreed to by defendants; force the defendants to expend additional public funds to defend the claims of plaintiffs and petitioners; waste judicial resources; and destroy a voluntary resolution of this dispute, forcing a trial on the merits. The severe prejudice to the existing parties thus militates against intervention. *Cf. Culbreath*, 630 F.2d at 21-22.

(iii) Petitioners will suffer no prejudice from the denial of intervention

As demonstrated in section A, *supra*, petitioners have not asserted any interest which warrants intervention. Unlike the parties in other post-*Stotts* cases such as *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, ____ U.S. ____, 105 S.Ct. 2015 (1985); *Equal Employment Opportunity Commission v. Local 638*, 753 F.2d 1172 (2d Cir.), *cert. granted*, ____ U.S. ____, 106 S.Ct. 58 (1985); and *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted*, ____ U.S. ____, 106 S.Ct. 59 (1985) petitioners have not asserted that the Decree resulted in a minority officer being promoted to sergeant ahead of any of the petitioners. Denial of intervention thus does not prejudice any even arguably protected interests of petitioners.

(iv) There Are No Unusual Circumstances Militating in Favor of Intervention.

This Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) is not an unusual circumstance which militates in favor of intervention. In fact, the *Stotts* case is irrelevant to petitioners' claims.

(a) The Stotts decision did not limit class-wide, prospective affirmative action relief under Title VII to indentifiable victims of discrimination

In *Teamsters v. United States*, 431 U.S. 324 (1977), this Court drew a sharp distinction between the evidentiary bur-

dens which must be met under Title VII to warrant an award of prospective affirmative action relief and the stricter burdens which must be met to warrant an award of retroactive, make-whole relief, such as a grant of retroactive seniority. The *Teamsters* Court stated that prospective class-wide relief could be granted on the basis of an unrebutted *prima facie* Title VII violation, but further held that individual awards of retroactive seniority could be made only to identifiable victims of discrimination. *Id.* at 330 n.4, 361-62 & n. 47. The *Stotts* Court did no more than reaffirm the *Teamsters* holding and, accordingly, the decision does not affect the propriety under Title VII of the prospective, class-wide relief challenged by petitioners.

In *Teamsters*, the United States brought suit under Title VII against an employer and a union for engaging in a pattern and practice of discrimination and sought: (1) a general injunctive remedy and (2) specific "make-whole" relief for all individual discriminatees in the form of retroactive seniority. *Id.* at 330.

Prior to the trial court's decision, the parties entered a partial consent decree which provided, *inter alia*, that minorities and whites would be hired on a one-to-one basis until the percentage of minority workers equaled the percentage of minority members in the surrounding metropolitan area. 431 U.S. at 330 n.4. The remaining issues were then tried before the district court which found that the defendants had engaged in a pattern and practice of discrimination. *Id.* at 331. On appeal, the Fifth Circuit expanded the relief granted by the district court and granted retroactive seniority to all minority employees of the defendant, regardless of whether they were actual victims of discrimination. *Id.* at 333.

The Supreme Court affirmed the lower courts' findings of a pattern and practice of discrimination, *id.* at 337, but further held that individual, "make-whole relief" in the form of retroactive seniority could be granted only to actual victims

of discrimination. In so ruling, the Court expressly contrasted the need for identifying actual victims when awarding retroactive seniority relief from situations where prospective, injunctive relief (such as an affirmative action order) is involved.

> If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. *Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief.* Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the Court, or any other order "necessary to ensure the full employment of the rights" protected by the Title.

Id. at 361 (emphasis added). The *Teamsters* Court stated that the parties' partial consent decree (which instituted a racial quota system that benefited unproven victims of discrimination) constituted such *prospective* relief in the case before it. *Id.* at 330 n.4 and at 361 n.47.

While the affirmative action plan contained in the partial decree could be ordered without regard to the identities of proven victims of discrimination, the *Teamsters* Court held that the individual relief sought by the plaintiffs in the form of retroactive seniority could only be extended to identified victims of discrimination.

> When the government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief . . . [In order to obtain such individual relief], [t]he Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and was therefore a potential victim of the proved discrimination.

Id. at 361-2. *Cf. Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) (Section 703(h) does not prohibit make-whole relief in the form of retroactive seniority awards to actual victims of discrimination.)[4]

---

[4] Petitioners argue that the Decree is invalid because it contains no admissions of liability on the part of the defendants. Petition at 8. That argument is based in part upon a misinterpretation of the last sentence of section 706(g) of Title VII which provides:

> [n]o order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 2000e-3(a) of the title.

Contrary to the petitioners' position, however, that sentence has in the past been interpreted as merely preserving the employer's defense that his challenged conduct was for a cause other than discrimination and not at all as addressing the scope of class relief available under the Act. *See Equal Employment Opportunity Commission v. American Telephone and Telegraph Co.*, 556 F.2d 167, 176, 177 (3d Cir. 1977), *cert. denied, Communications Workers of America v. Equal Employment Opportunity Commission*, 438 U.S. 915 (1978); *Williams v. City of New Orleans*, 729 F.2d 1554, 1557 (5th Cir. 1984). Moreover, the gross disparity in the Department's racial composition, stipulated to by the parties by the terms of the Consent Decree and by the defendants' Answers to plaintiff's Complaint (*see* n.1 *supra*) establish a *prima facie* Title VII violation sufficient to provide the basis for relief under the Act. *Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1128-32 (2d Cir. 1983), *cert. denied, Althiser v. New York State Department of Correctional Service*, 465 U.S. 1005 (1984); *Setser v. Novak, Inc.*, 657 F.2d 962, 968 (8th Cir. 1981). Indeed, in cases where such a *prima facie* case is unrebutted by a showing such that the contested practices are job-related, a court is required to enter a decree finding unlawful discrimination. *Kirkland*, 711 F.2d at 1130, citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Thus, petitioners' claim that the Decree lacks sufficient factual findings to support relief under Title VII has no basis in law or fact.

Against the necessary backdrop of the *Teamsters* decision, the narrow holding of the *Stotts* decision is clear. The respondent in *Stotts* was a firefighter from the Memphis Fire Department who filed a class action in 1977 alleging that the Department had engaged in a pattern or practice of discrimination on the basis of race in violation of Title VII and 42 U.S.C. Sections 1981 and 1983. Subsequently, a consent decree was entered pursuant to which the City agreed to an interim hiring goal of filling 50% of the job vacancies in the Fire Department with qualified black applicants. 467 U.S. at 565-66.

In May of 1981, because of projected budget deficits, the Fire Department began a series of layoffs based on a "last hired, first fired" rule, pursuant to the firefighters' seniority system. Of the approximately 40 employees in the Fire Department laid off, 15 were Black. *Id.* at 566-67.

The district court, over the objection of the City, granted an injunction against the seniority-based layoffs finding that they would have a racially discriminatory effect and that the seniority system was not bona fide under Title VII. *Id.* at 567. The effect of the injunction thus was to retroactively grant to new minority hires the seniority rights which employees with longer periods of employment enjoyed under the collective bargaining agreement.

On appeal, the Sixth Circuit held that the district court's conclusion that the City's seniority system was not bona fide was in error. Nevertheless, the Circuit Court concluded that seniority-based layoffs would violate the terms of the consent decree by reducing the percentage of minorities in the Fire Department. Alternatively, the Court held that the district court was empowered to modify the seniority system despite the system's immunization from attack under Section 703(h) of the Title VII. *Id.* at 568.

This Court reversed. At the outset, this Court rejected the Sixth Circuit's conclusion that the modification merely enforced the provisions of the consent decree, and noted that

there was no suggestion within the four corners of the decree of any intention to depart from the existing seniority system. *Id.* at 574-76.

The *Stotts* Court then considered, and rejected, the Circuit Court's conclusion that the district court's ruling was proper even if it conflicted with the seniority system. Because the district court's order constituted a retroactive award of seniority which, according to *Teamsters*, could be made under Title VII only to actual victims of discrimination, the *Stotts* Court held that the order was beyond the scope of the district court's remedial authority under Title VII. *Id.* at 577-79. Nowhere in the decision did the *Stotts* Court address the requirements (earlier set forth in *Teamsters*) for granting prospective, class-wide affirmative action relief under Title VII. Because that is precisely the relief afforded by the consent decree here, the holding in *Stotts* does not impose any requirement that the Decree benefit only identifiable victims of discrimination.

(b) The Stotts Decision did not restrict the scope of voluntary affirmative action efforts

Since this Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1970), it has been clear that the beneficiaries of voluntary affirmative action efforts may be members of a disadvantaged minority class and need not be proven victims of discrimination. The *Stotts* decision did not upset the Court's decision in *Weber*. Under *Weber*, the class-wide prospective affirmative action relief voluntarily agreed to by the parties to the decree clearly is consistent with Title VII.

The issue in *Weber* was whether employers were free under Title VII to take voluntary race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. *Id.* at 197. This Court held that although an

employer perhaps may not be *required* to engage in affirmative action to correct *de facto* racial imbalances in its work forces, Title VII *permits* employers to undertake voluntary affirmative efforts to correct such imbalances, even in cases (such as *Weber*) where there have been no prior judicial determinations that the employer has previously discriminated against the beneficiaries of the affirmative action. The *Weber* Court held that an employer's voluntary attempts to "eliminate conspicuous racial imbalance in traditionally segregated job categories" was thus permissible under Title VII, *id.* at 209, notwithstanding the absence of any findings of intentional discrimination or identification of actual victims of such discrimination.

In a concurring opinion, Justice Blackmun stated that, under the opinion of the Court, an individual employer need not have engaged in discriminatory practices in the past in order to properly institute an affirmative action plan; rather, a statistical disparity in "traditionally segregated job categories" would suffice to warrant voluntary affirmative action. *Id.* at 213. Clearly, under such a view a finding of actual discrimination is not a prerequisite to affirmative action efforts under Title VII. Every federal court which has considered the issue subsequent to the *Stotts* decision has so concluded.[5]

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[5] *See Local 638*, 753 F.2d at 1186 (2d Cir.), *cert. granted*, ___ U.S. ___, 106 S.Ct. 58 (1985); *Vanguards*, 753 F.2d 479, 486 (6th Cir.), *cert. granted*, ___ U.S. ___, 106 S.Ct. 59 (1985); *Diaz v. American Telephone & Telegraph,*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Wygant*, 746 F.2d 1157-58 (6th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015 (1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1983), *cert. denied*, ___ U.S. ___, 105 S.Ct. 782 (1985); *Grann v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 296 (1984); *Hammon v. Barry*, 606 F. Supp. 1082, 1095 (D.D.C. 1985); *Turner v. Orr*, 759 F.2d 817, 823-26 (11th Cir. 1985); *National Association for the Advancement of Colored People v. Detroit Police Officers Association*, 591 F. Supp. 1194, 1202-03 (E.D. Mich. 1984). *See also, Devereaux v. Geary*, 765 F.2d 268 (1st Cir. 1985).

Petitioners argue that because the defendants' voluntary affirmative action efforts are embodied in a consent decree entered as an order of the district court, they are prohibited by Title VII, depite the holding of *Weber*. *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted*, ____ U.S. ____, 106 S. Ct. 59 (1985) holds directly to the contrary. *See also, Sansom Committee v. Lynn*. 735 F.2d 1535, 1538 (3d Cir. 1984) ("Consent decrees need not be limited to the relief that a court could provide on the merits"); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1118, 1125 (D.C. Cir. 1984), *cert. denied*, 467 U.S. 1219 (1984) (consent decree may afford relief not authorized by underlying statute). *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961) is not to the contrary. The *Wright* Court merely held that a decree may not afford relief which is patently inconsistent with a substantive policy of the underlying statute. Given the holding of *Weber*, it is impossible to maintain that such is the case here.

C. Petitioners Are Adequately Represented by the Existing Parties.

Under Fed. R. Civ. P. 24, a prospective intervenor must demonstrate that the existing parties do not adequately represent its interests before being allowed to intervene. Moreover, a would-be intervenor faces a presumption of adequacy when it has the same ultimate goal as a party. *Moosehead Sanitary District v. S. G. Philips, Corp.*, 610 F.2d 49, 54 (1st Cir. 1979); *United Nuclear Corporation v. Cannon*, 696 F. 2d 141, 144 (1st Cir. 1982). To overcome that presumption, the applicant must demonstrate adversity of interest, collusion or nonfeasance. *Id.*

The petitioners have the same goal as the defendants in this action originally had: upholding the validity of the Department's former promotional practices. Indeed, in their Motion

to Intervene, the petitioners adopted the answer of the defendant Boston Police Department. Respondents' App. at 66. In order to overcome the presumption that their interests were adequately represented by the defendants, petitioners were required to demonstrate adversity of interests, collusion or nonfeasance. No such showing was made, and the Motion to Invervene was therefore properly denied.

Conclusion

For each and all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS BURKE, ET AL.,
PETITIONER,

v.

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., ET AL.,
RESPONDENTS.

Appendix to Respondents' Opposition to Petition for Writ of Certiorari

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Appendix to Respondents' Opposition to Petition for Writ of Certiorari

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Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., et al.,
Plaintiffs

v. CIVIL ACTION NO. 78-529-Mc

THE BOSTON POLICE DEPARTMENT, et al.,
Defendants

MEMORANDUM AND ORDER

McNAUGHT, D. J.

This action came on to be heard on the motion of the plaintiffs that the consent decree's life be extended an additional five years to allow for the achievement of the objectives set forth therein. Basis for the motion was the contention that none of the goals has yet been reached. At the same time, motions to intervene for the purpose of arguing against the motion for extension of the decree were heard. These motions (to invervene) were filed by (1) a group of named police officers, (2) the Boston Police Superior Officers Federation and (3) the Boston Police Patrolmen's Association (BPPA). Although I did not rule on the motions to intervene, I permitted counsel representing each of the applicants for intervention to argue substantively on the wisdom (or lack thereof) of action on the motion to continue the decree.

First, the applications for intervention must be and are hereby denied. The objections of the applicants are duly noted, however, and the contentions advanced by them have been considered despite their lack of "standing." Intervention at this late date simply cannot be permitted. No valid reason has been offered for making an exception as to any of the applications.

The motion to modify and continue the consent decree is allowed. The plaintiff's position, in my opinion, is obviously correct. The decree thus far has been in force for five years and not one goal has been attained. The first validated exam didn't start until June 1, 1985 and wasn't completed until September 23, 1985 (after the date on which the decree was to have expired). Grading has not yet been done by the Department of Personnel Administration for the Commonwealth. The Affirmative Action Committee has not fulfilled its functions to the present time, although action in that direction is expected.

On the other hand, I am satisfied that the Department of Personnel Administration is correct in its contention that the consent decree, as it pertains to the Department (and only the Department), need not be continued beyond December 31, 1985. At that time it will have dispatched its responsibilities with the exception of its duty to monitor the situation under Mass. General Laws, c. 31, § 25. This court must assume that the Department will carry out its duty, and that the "coercive force" of an order of this Court is not needed.

The motion to modify and continue the decree is, therefore, allowed, with permission to modify the goals and timetables, factual background and statistics to reflect the changed demographics which have occurred within the Department during the past five years. A new proposed Order embodying the limitation described with respect to the Department of Personnel Administration may be submitted for signature.

John J. McNaught
United States District Judge

October 31, 1985

Appendix B

PROPOSED CONSENT DECREE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., *et al.*,
Plaintiffs,

v. CIVIL ACTION NO. 78-529-McN

THE BOSTON POLICE DEPARTMENT, *et al.*,
Defendants.

CONSENT DECREE

Plaintiffs, Massachusetts Association of Afro-American Police, Inc. ("MAAAP"), *et al.*, filed their complaint in this action on March 2, 1979. The complaint sought certification of the suit as a class action and alleged that the defendants were engaged in employment discrimination based on race and color in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; the Civil Rights Act of 1871, 42 U.S.C. § 1983; the Civil Rights Act of 1870, 42 U.S.C. § 1981; 42 U.S.C. § 1988; Mass. Gen. Law c. 31, § 10; Mass. Gen. Laws c. 151B, and Article I, Part the First, Constitution of Massachusetts.

The defendants are the Boston Police Department ("Department"), Department Commissioner Joseph Jordan ("Commissioner", "Jordan"), Mayor Kevin H. White ("Mayor", "White"), Massachusetts Personnel Administrator David Marchand ("Administrator", "Marchand"), and the members of the Massachusetts Civil Service Commission. The Depart-

ment, Jordan and White are referred to collectively as the "City Defendants"; the others are referred to collectively as the "State Defendants".

Plaintiffs seek declaratory judgment, injunctive relief, and monetary damages.

The Court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. §§ 1331, 1343(4), and 1345.

As of March 2, 1978, when this action was commenced, approximately 111 or 5.5 percent of the estimated 2,232 sworn officers in the Department were black, whereas the population of the City of Boston was approximately 20 percent black. 108 or 5.8 percent of the estimated 1,831 police officers in the Department were black; 3 or 1 percent of 269 sergeants were black; there were no blacks among the 50 lieutenants or 25 captains in the Department.

Promotion of sworn officers is to a large degree dependent on the operation and administration of the Massachusetts civil service law by the State Defendants.

It now appears to the Court that all parties have waived hearings, findings of fact, and conclusions of law and have agreed to the entry of this Decree. The consent of the parties shall in no manner constitute findings on the merits in this action, nor shall it be construed as an admission by the defendants of any violation of Title VII, Title VI, 42 U.S.C. §§ 1981, 1983, and 1988; Mass. Gen. Laws c. 31, § 10; Mass. Gen. Laws c. 151B; or Article I, Part the First, Constitution of Massachusetts; nor shall it be construed as an admission by the defendants to any of the matters in the complaint filed in this action. To the extent that this action involved allegations of employment discrimination in promotion other than to the rank of sergeant, assignment, training, discipline, treatment, and other terms and conditions of employment, such allegations are not resolved herein, nor are they intended to be, and they are in effect being voluntarily dismissed without any prejudice whatsoever.

In connection with the entry of this decree, the action is certified as a class action under Rule 23 (b) (2), Federal Rules of Civil Procedure, the class being:

> All present and future black sworn officers in the Boston Police Department.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED:

I. GENERAL

1. In the event that the entry of this Decree generates, either through intervention or in separate, collateral lawsuits, challenges to the propriety of any remedial measure contained herein, the parties to this Decree shall defend the lawfulness of this Decree. If any such collateral lawsuit arises in a State Court, the defendants shall remove such action to the Federal District Court.

II. SERGEANTS' LISTS

2. The Boston Police Department will promote no more than twenty-five officers from the existing eligible list as established in March 1979 for permanent positions of sergeant (the "1979 List"). The Department shall make every effort, when making these appointments, to maintain sufficient vacancies in the rank of sergeant to comply with the goals referred to in paragraph 7 of this Decree.

3. The Department shall notify MAAAP as soon as it anticipates requesting certifications for appointment to permanent positions of sergeant and shall provide it in writing with the number and dates of these anticipated appointments.

III. PROMOTIONAL TESTS

4. The defendants shall not use tests (including written examinations, practical exercises, and training and experience

scores) for the purpose of selecting police officers for promotion unless such tests are validated in accordance with the "Uniform Guidelines on Employee Selection Procedures" 29 C.F.R. § 1607.1 et seq. (the "Guidelines"), or otherwise shown to have no discriminatory impact. All parties shall cooperate in developing acceptable tests. The persons developing and administering such tests shall be properly trained as required by the Guidelines.

5. At least 75 days prior to the defendants' intended use of any promotional test, they shall submit to plaintiffs' counsel copies of validation studies showing that the particular tests conform with the Guidelines. Such materials shall be treated as confidential material within the meaning of the Protective Order appended to this Decree as *Appendix A*. If the parties disagree as to whether a particular test, its scoring, or the ranking based on its results, has been shown to be valid within the meaning of the Guidelines, the question of its validity shall be resolved by the Court, and such resolution, whether by the parties' agreement or by the Court, shall be accomplished before any such test is put into use for the purpose of qualifying or selecting.

6. The Department will provide opportunity for training for all eligible applicants before promotional tests and will ensure that minority applicants for promotion are afforded equal access to such training. The Department shall also post notice of forthcoming promotional exams on all bulletin boards used by the Department for making announcements to police officers at least 60 days in advance of any written examination for promotion to enable interested police officers to have sufficient time to apply for and prepare for such examinations.

7. Persons passing future validated tests shall be ranked in a manner which complies with the Guidelines. The Commissioner shall make appointments to overcome any underutilization that may exist among sergeants in accordance with the goals set forth in *Appendix B* to this Decree.

8. The merger, if any, of promotional lists will be made in a manner consistent with the Guidelines.

9. The State Defendants shall delegate to the Department the responsibility for construction, validation and administration of new tests for promotion to sergeant, provided, however, that:

(i) the State defendants will notify plaintiffs' counsel of any delegation and will provide them with copies of any memoranda of agreement relating to said delegation;

(ii) any delegation by the State defendants shall be subject to revocation by them in the event that any of the delegated duties or responsibilities are exercised in violation of, or in a manner inconsistent with, any provision of this Decree. In such event the State defendants shall revoke the delegated authority and reassume the delegated functions.

10. Defendant Boston Police Department without delay shall take specific steps to implement its Affirmative Action Plan as set forth in *Appendix C* attached to this Decree. Nothing in this Decree shall be construed to limit the Department's authority to amend its Affirmative Action Plan in a manner consistent with the attainment of the objectives of this Decree. In any event, at least 30 days prior to any proposed amendment, the Department will notify MAAAP in writing of the proposed amendment.

11. The Affirmative Action Committee of defendant Boston Police Department shall report to counsel for the parties within 60 days of the entry of this Decree as to the steps it is taking to implement the Department's Affirmative Action Plan.

12. Within 90 days from the entry of this Decree, the parties shall meet to determine the amount due to plaintiffs' counsel for costs and attorneys' fees. If the parties are unable to agree, the matter shall be presented to the Court for resolution upon motion of either party.

13. The Court shall retain jurisdiction for such further action as may be necessary or appropriate. The Decree shall

terminate after 5 years from its entry unless any party has moved for its continuation on ground that the objectives of the Decree have not been fully achieved. The Court will thereupon determine whether or not the Decree will be dissolved.

Dated this 9th day of July, 1980.

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Court Order

The above Consent Decree is allowed, and its terms are to be entered as an order of this Court.

Dated: September 16, 1980

_____

John J. McNaught

U.S. District Judge

BOSTON POLICE DEPARTMENT

Appendix B

There are currently 222 Sergeants in the Boston Police Department, one of whom is black. Two other blacks who hold the permanent civil service rank of Sergeant are members of the Command Staff as Deputy Superintendent or Superintendent, in positions exempt from Civil Service. The one black now serving as a sergeant accounts for .45% of all sergeants in the department. This compares with a percentage minimum service eligibility factor of 4.5%. (There are currently 72 black officers who are eligible for promotion to sergeant, in that they have three years of service after certification.) There are a total of 1601 officers in the department of all races who are similarly eligible.

The reasons for the under-representation of minorities in the sergeant's pool includes the following:

Thirty-four of the eligible black officers were hired in 1974 and 1975. Fourteen of those persons were hired in February, 1974. Those fourteen have been eligible to take only one sergeant's examination, that is, the examination given in February of 1977. The other 20 black officers were hired in February of 1975. They have had no opportunity to take a sergeant's examination because none has been administered since the February, 1977 examination. They did not have the three years eligibility to take that exam. Therefore at the time of the last examination for sergeant, only 3.1% of the eligible applicants for sergeant were blacks, and only 2.3% of the eligible candidates were black with at least seven years service in the department at the time of the last promotional examination. The relatively small number of eligible applicants can perhaps be traced to the testing practices of the then State Division of Civil Service (See *Castro* v. *Beecher*).

Testing practices for promotional positions for the Boston Police Department have been revised significantly since

1972. Prior to that time a very high percentage of the test results (generally more than 40% of the final score) was determined by seniority. The department has significantly reduced the impact of seniority on test outcomes since then. However, it is reasonable to assume notwithstanding these changes, that seniority continues to have some impact. Seniority has a statutory defined role through the requirement that experience be rated in promotional positions in the Commonwealth. It is also clear that some level of experience beyond the three years minimum is helpful in preparing applicants for the responsibilities of supervisory positions. This extra experience is helpful in preparing applicants for the selection procedures used in promotion, through the broadening of their knowledge of departmental procedures, rules, statutes, accepted policing and supervisory practices, leadership, judgment, which are the principal areas tested in the promotion process.

In the past, the Department has found that seven or more years experience has been an appropriate measure of the point at which a police officer may be viewed as at the top of his/her skills, having had enough experience in the department to have encountered and dealt with almost all of the kinds of problems officers face and to have dealt with the most common of them frequently enough to have mastered the technique for dealing with them. (A review of the results of the two most recent sergeant examinations, given since seniority was drastically reduced, shows that for those promoted from the 1974 examination, the median seniority was 17 years, 11 months and for those on the March 1979 list, the median seniority at the time of completing the examination process was 11 years.)

The number of minority police officers in the department is rising dramatically, due in large part to the certification rule changes arising from *Castro* v. *Beecher*. Thus, the percentage of blacks eligible for promotion to sergeant should also rise

significantly over the next several years. However, it is also likely that because these will, of necessity, be persons of reasonably short experience and seniority in the department, they will not yet be competing on a completely equal footing with the rest of the available pool of applicants for sergeant. A further consideration making projections on the make-up of future promotion lists difficult is the widely differing verbal skills of the officers who take promotional tests.

In order to prevent the disparity between the percentage of black supervisor and the percentage of blacks eligible for promotion to supervisor from growing, and in order to reduce that disparity, it is appropriate that the department take affirmative measures to promote more blacks to supervisory positions.

This can be done by taking further steps beyond what has already been accomplished to ensure that promotional examinations are job-related and to minimize the disparate impact on blacks. The department will conduct pre-promotional training classes, open to all members of the department who are eligible for promotion to sergeant and will assure that word difficulty, sentence complexity, etc. on promotional examinations is no greater than required by the job content of the material involved. The department will also seek to further reduce the impact of straight seniority on the selection process.

GOALS AND TIMETABLES

The goals and timetables outlined below are based upon the guidelines in Section 1608.4 of the Guidelines on Affirmative Action of the Equal Employment Opportunity Commission, 29 C.F.R. Part 1608. These goals and timetables take into account the unintentional discrimination found and the remedies implemented in the case of *Castro* v. *Beecher* as it affected entry level hiring; the need for prompt elimination of adverse impact or disparate treatment; the availability of

qualified or qualifiable applicants; and the number of promotional opportunities expected to be available. The parties agree that the obligation of the Department is to make a good-faith effort to reach these goals and that these goals have been set in anticipation of having a sufficient number of black officers eligible to be promoted from lists based on validated tests. The goals and timetables are organized according to projected employment statistics as of the dates listed below:

BOSTON POLICE DEPARTMENT

GOALS AND TIMETABLES: BOSTON POLICE DEPARTMENT

Date	Projected No. Of Sergeants	Projected No. Of Positions To Be Filled	Projection of Blacks As A Percentage Of Patrol Officers With 3 Years In Grade*	Projection Of Blacks As A Percentage Of Patrol Officers With 7 Years In Grade**	GOALS	
					No. Of Black*** Sergeants	Blacks As A Percentage Of Sergeants
July 1980	228	25	4.4	2.6	3	1.3
Dec. 1981	242	24	7.1	3.4	8	3.2
Dec. 1982	270	35	7.0	4.6	13	4.8
Dec. 1983	270	30	12.6	4.4	18	6.7
Feb. 1985	270	35	14.6	6.9	25	9.2

*Three years in grade as a patrol officer is a requirement for promotion to sergeant.

**It has been the experience of the Department that those officers actually promoted to sergeant have had 7 years in grade as patrol officers.

***Includes sergeants who serve in higher, non-Civil Service positions.

The figures in these Goals and Timetables do not reflect unanticipated attrition.

Appendix C

Implementation of Boston Police Department Affirmative Action Plan

The following steps shall be taken to implement the Boston Police Department Affirmative Action Plan insofar as it applies to black sworn personnel. Parenthetical references are to sections and pages of the Boston Police Department Affirmative Action Plan dated January, 1977.

Internal Dissemination of Policy (Part III)

1. Copies of the Affirmative Action Plan will be made available to all employees for their inspection at reasonable times. Employees will be notified of them. (p. 2)
2. A briefing on the Department's Affirmative Action policy will be a regular part of the Department's orientation programs. (p. 2)
3. All Affirmative Action policy decisions shall be posted on bulletin boards and translated into appropriate languages. (p. 2-3)
4. The Department's Policy Manual will contain a copy of the Equal Employment Opportunity Statement. (p. 3)
5. All union agreements and personnel contracts will contain provisions ensuring nondiscrimination. (p. 3)

Affirmative Action Committee (Part IV)

6. The Department will establish an Affirmative Action Committee. The Commissioner shall solicit applications for membership on the Committee and shall make appointments which are representative of each major job classification with an emphasis on the recruitment of women, minorities and older workers. The Affirmative Action Committee shall review the progress of Departmental Affirmative Action,

monitor the implementation of Departmental goals and timetables, review job assignment patterns, review the status of any employment discrimination complaints made by employees or applicants, and submit monthly reports to the Commissioner. (p. 3; Executive Order of February 23, 1976, as amended March 18, 1976, §VII.)

7. The following persons shall be included on the Affirmative Action Committee: William Celester and Roy Howard. In addition, the Committee or the minority members of the Committee may make recommendations to the Commissioner as necessary for specific action to overcome EEO difficulties within the Department. The Commissioner shall review such recommendations and shall make a good faith effort to implement them or provide the Committee with an explanation in writing of the reason for not doing so.

8. The Department will appoint an Equal Employment Opportunity Officer who will be jointly responsible with the Commissioner for implementation of the Affirmative Action Plan. (City of Boston Affirmative Action Program, §4b.)

Promotions (Part X)

9. Every employee will be notified of his or her salary review at least four weeks in advance. (p. 150)

10. Every employee will have the opportunity to discuss his or her performance, current openings on the job vacancy list, or other matters relevant to promotion, with supervisor at least four weeks prior to review. (p. 150)

11. Every employee will receive copies of all evaluations and promotional recommendations made by his or her salary review. (p. 150)

12. Any evaluation form used will be designed not to encourage discrimination practices. (p. 150)

13. Every employee will be notified of rights and responsibilities in the salary review process. (p. 151)

14. The Department, as part of its program, will design in conjunction with MOHR and implement a training program to upgrade the talents of minority, female and older worker employees. The program shall include instruction in language, clerical, trade and supervisory and management skills. (Boston AAP, §4g.)

15. Promotional tests will be validated in accordance with the *Uniform Guidelines on Employee Selection Procedures (1978)* of the Equal Employment Opportunity Commission, Civil Service Commission, Department of Justice, and Department of Labor. (p. 154)

Complaint Procedure (Part XIV)

16. A notice will be placed on all bulletin boards advising employees that any grievance of allegations of discrimination may be brought to the Investigative Unit of the Affirmative Action Program of the City of Boston, or the EEOC, and that no employee who seeks relief will be subjected to reprisal, intimidation or harassment. The notice will also set forth the complaint procedure for city employees set forth in the City of Boston Affirmative Action Program. (p. 157; Boston AAP, §6.) (See Exhibit A for copy.)

Affirmative Action Progress Reports (Part XV)

17. Affirmative Action Progress reports, listing all employees, salary, race and sex, all promotions, terminations, hiring, transfers within six-month intervals and all sources used by the Department in finding prospective candidates will be compiled at six-month intervals by the Personnel Division and submitted to the Affirmative Action Committee. (p. 158; Boston AAP, §3.)

18. The Department semi-annually shall furnish to MOHR on forms to be provided by it and to the Department's Affirmative Action Committee, the following information:

1. Name of departmental personnel involved in hiring and promotion.
2. Departmental table of organization.
3. Job classification.
4. Compensation rates for each classification.
5. Existing job description for each classification.
6. An update job description if the existing one does not correspond to the work actually being done.
7. Vocational qualifications of persons holding the positions.
8. Pension, tenure, and other prerequisites attached to the job.
9. Departmental criteria for promotion.
10. Departmental criteria for demotion.
11. Number and/or names of minority, female and older worker employees stratified by their classifications.
12. Explanation of hiring practices, including recruitment and advertising sources.
13. Names of unions representing employees and departmental stewards.
14. Type of information customarily collected on employees.
15. List of all positions which became open or were created (even if already filled) during the previous year.
16. Approximate number of people applying for the jobs referred to in (15).
17. Names and addresses of minority, females, and older workers applicants for the jobs referred to in (15).
18. Promotions made during the previous 6 months.
19. Names of minority, female, and older worker employees passed over for promotion.
20. Names of persons receiving the promotions. (City of Boston AAP, §4c.)

Goals and Timetables (Part XVI)

19. The Department will conduct annual utilization analyses by Division and by Unit and will set goals and timetables for overcoming any underutilization of minorities and women in any Division or Unit as described in the OFC-CP Affirmative Action Guidelines - Order No. 4, 41 CFR 60-2 and will submit such utilization analyses and goals and timetables to the Affirmative Action Committee for its review. (p. 158; Boston AAP, §§1a & b, 3, 4a; Mayoral Executive Order of February 23, 1976, as amended March 18, 1976, §§III, IV.)

20. The Department will solicit minorities and women to take the Civil Service exams for positions in the Department. This effort will include advising agencies which can help recruit minorities and women of upcoming exams.

EXHIBIT A
COMPLAINT PROCEDURE FOR CITY EMPLOYEES

The use of the complaint procedure is not intended to preclude an employee or job applicant from utilizing those other remedies to which he/she is entitled, including those set forth in any revelant collective bargaining agreement, as well as those remedies available under state and federal law.

(a) Any city employee may file a discrimination complaint with MOHR.

(b) Upon receipt of a complaint, MOHR shall conduct an investigation to determine if discrimination exists. If discrimination does not exist, the complaint shall be dismissed. If discrimination is found to exist, MOHR shall endeavor to obtain a conciliatory agreement between the parties. If conciliation between the parties is impossible, MOHR shall determine the matter.

(c) An employee or department head may within 10 days after being notified of any determination by MOHR appeal to the Employment Practices Appeal Board which shall make a final disposition of the case.

(d) Said Board shall consist of the following members: the Corporation Counsel, who shall chair the Board, the Deputy Mayor, the Director of the Mayor's Office of Personnel, the Administrator of the Mayor's Office of Human Rights, the Chairwoman of the Commission to Improve the Status of Women, a Union representative, and a member who shall be appointed annually by the Mayor. The Mayor shall further designate three alternates to the Board.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., WILLIAM CELESTER, and ROY HOWARD, individually and on behalf of all others similarly situated

Plaintiffs

v. CIVIL ACTION NO. 78-529-F

THE BOSTON POLICE DEPARTMENT, JOSEPH JORDAN, individually and in his capacity as Commissioner of the Boston Police Department, KEVIN H. WHITE, individually and in his capacity as Mayor of the City of Boston, WALLACE KOUNTZ, individually and in his capacity as Personnel Administrator of the Massachusetts Division of Personnel Administration, and AMELIA MICLETTE, RICHARD H. LINDEN, JOHN F. DONEGAN, RUTH M. MACROBERT, WAYNE A. BUDD, individually and in their capacities as Commissioners of the Massachusetts Civil Service Commission

Defendants

VERIFIED COMPLAINT

I. *Nature of this Action*

1. This is a class action brought to redress discrimination on account of race and color resulting from the defendants' employment practices and policies, including promotional practices and policies, which deny black police officers in the Boston Police Department (the "Department") the same employment opportunities that are afforded white officers. As a consequence, black officers have been and continue to be restricted to the lower echelons of the Department and have

been denied higher pay and status within the Department. Plaintiffs seek declaratory and injunctive relief to end defendants' denial to them and similarly situated black officers of equal employment opportunities and to redress the present effects of past discrimination.

II. *Venue and Jurisdiction.*

2. The unlawful employment practices complained of below were and are being committed in the Commonwealth of Massachusetts. Jurisdiction is alleged under each Count of the Statement of Claims.

III. *Parties.*

A. *Plaintiffs*

3. The Massachusetts Association of Afro-American Police, Inc. ("MAAAP") is a nonprofit corporation which was established in 1968 by black police officers in Massachusetts. MAAAP is affiliated with the National Black Police Association and is concerned with improving employment opportunities for minority police officers and minority applicants for law enforcement jobs as well as helping generally to improve conditions in minority communities. Each of the plaintiffs named individually herein is a member of MAAAP. MAAAP's members have suffered and will continue to suffer immediate and irreparable injury as a result of the defendants' use of discriminatory practices or promotional policies. If MAAAP is denied the opportunity to represent and protect the interests of its members in this action, it will suffer a loss of membership and financial support.

4. (a) Plaintiff William Celester is and at all relevant times has been an employee of the Boston Police Department as that term is defined in 42 U.S.C. § 2000e(f). He is a 34 year-old black citizen of the United States and a Massachusetts resident. He received an associate of arts degree in law en-

forcement in June 1977 from Northeastern University and is currently completing his course work for a bachelor's degree. He is currently on leave from the Boston Police Department due to his appointment on September 16, 1977, by Defendant Mayor Kevin White to the position of Commissioner of Penal Institutions for the City of Boston. In this capacity, plaintiff Celester is responsible for approximately 200 employees who are involved with the administration of the Deer Island House of Correction, currently housing approximately 250 inmates.

(b) Mr. Celester joined the Boston Police Department on August 28, 1968, and has served in the entry-level position of patrol officer since that time. He has been assigned as a recruit officer, recruit training officer, and as a patrol officer in District 11 to the special investigations unit of Suffolk County District Attorney's office and to the background investigation section for examining new police officer applicants. Until his appointment in September as Penal Commissioner, he was a detective assigned to District 3. Additionally, plaintiff Celester was appointed by Attorney General Frank Bellotti to serve as chairman of the Committee on Blacks and Criminal Justice, and was appointed by Governor Michael Dukakis as a member of the Committee on Criminal Justice.

(c) In November, 1974, plaintiff Celester took and passed the test administered by the Massachusetts Division of Civil Service (now the Division of Personnel) for promotion to the rank of sergeant in the Department. He received a composite score of 80% on the written examination, oral interview, and training and experience components, and was qualified for promotion to sergeant on a list established by defendant Personnel Administrator. Plaintiff Celester has not been promoted.

(d) Plaintiff Celester also took the written exam portion of the sergeant's test administered by the Massachusetts Divi-

sion of Personnel on February 12, 1977, and he received a 62% on that written exam, making him ineligible for promotion from the eligible list to be promulgated upon the completion of the 1977 sergeant's testing process.

(e) Plaintiff Celester is highly qualified for promotion to the rank of sergeant, but has been denied the same promotional opportunities afforded white police officers in the Department and has been precluded from advancement therein by the defendants' practices or promotion policies.

5. (a) Plaintiff Roy Howard is and at all relevant times has been an "employee" of the Boston Police Department as that term is defined in 42 U.S.C. § 2000e(f). He is a 35 year-old black citizen of the United States and a Massachusetts resident. He is a high school graduate. He is currently enrolled in Boston State College from which he expects to receive a bachelor of arts degree in business in 1978.

(b) Mr. Howard joined the Boston Police Department on October 10, 1970, and he has remained in the entry-level position of patrol officer since that time. He has worked on a variety of assignments, including patrol, tactical police force, informational services, housing, recruit investigation and background investigation for new patrol officer applicants.

(c) In November, 1974, Mr. Howard took and passed the test administered by the Massachusetts Division of Civil Service (now the Division of Personnel) for promotion to the rank of sergeant in the Department. He received a composite score of 75% on the written examination, oral interview, and training and experience components, and qualified for promotion to sergeant on a list established by defendant Personnel Administrator. Plaintiff Howard has not been promoted to the rank of sergeant.

(d) Plaintiff Howard has taken the sergeant's test administered by the Massachusetts Division of Personnel beginning in February 1977, and he received a composite score of 78%.

(e) Mr. Howard is highly qualified for promotion to the rank of sergeant, but he has been denied the same promotional opportunities afforded white officers in the Department and has been precluded from advancement therein by defendants' practices or promotional policies.

B. *Defendants*

6. Defendant Boston Police Department (the "Department") is now and at all relevant times has been a governmental agency within the meaning of 42 U.S.C. §2000e(a), organized pursuant to the City of Boston Code, Statutes, Title 11, § 1, and operating in the City of Boston, Massachusetts, where it is responsible for the prevention and investigation of crime, the apprehension of criminals, the maintenance of order, the enforcement of laws and statutes, the enhancement of the public safety, and the provision of other police and emergency services. The Department does now and has continuously employed more than fifteen persons.

7. Since at least March 24, 1972, the Department has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of 42 U.S.C. §2000e(b), (g) and (h).

8. Defendant Joseph Jordan is the Commissioner of the Boston Police Department. Pursuant to the City of Boston Code, Statutes, Title 11, § 1, he is responsible for the supervision, administration, and operation of the Department and is the sole appointing authority in the Department.

9. Defendant Kevin H. White is the Mayor of the City of Boston. Pursuant to the City of Boston Code, Statutes, Title 2, § 1, he is the chief executive officer of the city and is responsible for the overall administration of the city government and its various departments, including the Police Department. It is his responsibility to see that the policies and practices of the city government and its various departments do not violate the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

10. Defendant Wallace Kountz is the Personnel Administrator of the Massachusetts Division of Personnel Administration. Pursuant to M.G.L. c.31, §2A, he is responsible for the administration and operation of the Division of Personnel Administration and is specifically responsible for, among other things, developing and administering civil service examinations in the Department, determining and passing upon the qualifications of applicants, establishing eligible lists for promotion, and certifying eligible persons to the appointing authorities in the Department.

11. Defendants Amelia Miclette, Richard H. Linden, John T. Donegan, Ruth M. MacRobert, and Wayne A. Budd are members of and constitute the Massachusetts Civil Service Commission (the "Commission"). Pursuant to M.G.L. c.31, §3, they are responsible for making and amending the rules which govern the Massachusetts civil service system as it applies in the Department.

12. Promotions in rank for police officers in the Department are subject to civil service rules and testing procedures promulgated by defendants Kountz and the defendant members of the Commission. These persons are named as defendants in this action insofar as they are responsible for promulgating such rules and testing procedures. Other job assignments in the Department are subject to the authority of defendants Jordan and White. Pursuant to M.G.L. c.31, §§2A, 3 and City of Boston Code, Statutes, Titles 2, 11, the above-named individual defendants have both the authority and the responsibility to end policies and practices which deny black police officers equal employment opportunities in the Department.

IV. *Class Action Allegations.*

13. (a) Plaintiffs bring this action pursuant to Fed.R.Civ.P. 23(b)(2) on their own behalf and on behalf of all others similar-

ly situated. The class consists of all black officers who have been or are being denied equal employment opportunities in the Boston Police Department, or who might be denied said opportunities in the future due to the discriminatory practices and policies of the defendants.

(b) The class is so numerous that joinder of all members is impracticable. There are common questions of law and fact. The claims of the plaintiffs are typical of the claims of the class. The plaintiffs will fairly and adequately protect the interests of the class.

(c) Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

(d) The named individual plaintiffs have each been discriminated against both in the past and the present. The conditions of employment of which they complain apply equally to all members of the class and the relief which they seek is equally applicable to all members of the class.

V. *Background Allegations*

14. For a long time, and at all times since the individual plaintiffs have been employed in the Department and continuing up to the present time, the Department, and its administrative and personnel staff, and the individually named defendants (each to the extent he or she has authority and responsibility as set forth above) have discriminated against black officers in the Department with respect to wages, assignments, discharge, compensation, promotion, transfer, harassment, and other terms, conditions and privileges of employment because of their race and color. Defendants have intentionally participated in or promoted the pursuit and continuance of policies of unlawful and systematic discrimination against black officers as a class because of their race and

color by intending to, effecting, and allowing to continue policies and practices of, among other things:

(a) failing to assign black officers to jobs offering increased pay and upward mobility in the same manner and at the same rate as comparably trained and qualified white officers (All of the 36 officers given improved assignments during the period July 1, 1976 to January 1, 1977 were white.);

(b) failing to promote black officers to higher ranks in the same manner and at the same rate as comparably trained and qualified white officers;

(c) using standards that are vague and subjective, without any safeguards to insure impartiality, and which adversely affect black applicants, in conducting and scoring oral interviews as part of the promotional testing process;

(d) maintaining an atmosphere and conditions of harassment and insult and failing to take positive and appropriate steps to correct such atmosphere and conditions;

(e) failing to hire or promote black officers to positions of authority and decision-making positions;

(f) failing duly to adopt and maintain grievance procedures in order to ensure that cases in which discrimination is alleged are given due consideration;

(g) failing to remedy unequal retirement pay resulting from salary inequities and slower rates of promotion for black officers;

(h) failing and refusing to assign black officers to certain job positions because of their race and color;

(i) discriminatorily assigning a disproportionately high number of black officers to inferior job positions;

(j) using testing processes for promotions which disqualify a disproportionately high number of black officers as compared to white officers and which have not been shown to be predictive of or substantially related to the ability of applicants to perform the duties of the positions sought;

(k) arbitrarily selecting passing scores for promotional civil service tests which deny black officers meaningful

consideration of their qualifications for promotion without determining whether such scores are related to the ability of applicants to perform the duties of the position sought;

(l) inflexibly using arbitrarily small differences in test scores to rank individuals for promotion where the tests involved lack the sophistication to distinguish between close scores, and where the distinctions provided by such scores deny black officers meaningful consideration of their qualifications for promotion;

(m) using interview panels, many of which consist solely of white superior officers and civilian personnel to conduct the graded oral examination or career interview component of the civil service tests;

(n) using a seniority factor in computing the training and experience component of the cummulative test score used in determining eligibility for promotion, which has the effect of perpetuating past discrimination against black applicants for hire as officers in the Department found to exist in *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972);

(o) destroying written examination papers and other promotional test records in violation of applicable EEOC Regulations, 29 C.F.R. §1602.14(a), which prevents officers from reviewing their performance, learning their errors and thereby trying to improve their future efforts, and which insulates defendants from accountability regarding the assignment of grades on the written exams and other portions of defendants' promotional tests;

(p) failing and refusing to take affirmative action to correct the effects of the discriminatory policies and practices complained of herein as is demonstrated by the fact that defendants Jordan and White promulgated an Affirmative Action Plan, dated January 1, 1977 (the "Plan"), with which there has not been meaningful compliance at least in the following respects:

(i) Defendants have refused and failed to enforce the Plan's statement of commitment to equal employment opportunity in that they have denied "equal opportunity for all qualified and qualifiable persons" and failed to "promote the full realization of equal opportunity

through positive and continuing programs within the department" by discriminating against the individual plaintiffs and members of their class in appointment, recruitment, selection for, and participation in job opportunities and other terms and conditions of employment relative to promotion and advancement within the Department.

(ii) Defendants have refused and failed to enforce the Plan's Statement of Intent by failing to utilize minority group persons at the middle and upper salary levels and to insure their equal participation in all segments of the Department's workforce.

(iii) Defendants have refused and failed to enforce the Plan's statement of internal dissemination by failing to make available to Department employees policy decisions concerning affirmative action and by failing to communicate the terms of the plan to Department employees.

(iv) Defendants have refused and failed to allow the Department's Affirmative Action Committee to review the progress of the Department's affirmative action measures or monitor the implementation of Departmental affirmative action goals and timetables. Further, defendants have refused and failed to require the Affirmative Action Committee to submit monthly reports to the Commissioner as required by the Plan; in fact, the Committee was convened only once in early 1977 and has not met since that time.

(v) Defendants have refused and failed to enforce the Plan's requirements (1) that "no appointment to any position be made until minority group persons . . . have been aggressively sought out, identified and encouraged to apply," (2) that recruitment be effected so as to increase "significantly the number of minority group persons . . . wherever they are being underutilized," and (3) that positions be kept open until qualified minority group persons have been located and recruited to fill those positions. As a result, the underutilization of black officers in positions offering higher pay and status and denial to them of equal opportunity with white officers has continued unabated.

(vi) Defendants have violated the Plan by using tests which have not been validated to insure that they are necessary for evaluating job performance.

(vii) Defendants have refused and failed to designate an EEO Officer and have failed to require such EEO Officer to "insure that promotional opportunities . . . [be made] available to all employees on an equal basis."

(viii) Defendants have refused and failed to comply with the selection process outlined under "Departmental Procedure for Promotion of Sworn Personnel" in administering the February, 1977, sergeant's test.

(ix) Defendants have refused and failed to require the Department's Personnel Division to compile periodic affirmative action progress reports required by the Plan.

(x) Defendants have refused and failed to seek out minority employees to fill provisional promotional positions.

(xi) Defendants have refused and failed to prepare underutilization analyses and goals and timetables required by the Plan for the employment of minorities.

15. Black officers are excluded from the higher echelons of the Department and are denied higher pay and status within the Department, as illustrated by the following facts:

(a) Although blacks comprise approximately 20% of the population of the City of Boston, only about 111 or 5.5% of the estimated 2216 sworn officers in the Department are black men.

(b) Approximately 108 or 5.8% of the estimated 1831 persons with the rank of patrol officer in the Department are black men.

(c) Only 3 or 1.0% of approximately 278 sergeants in the Department are black, but two of these men serve as deputy superintendent; thus, only 1 sergeant serving as a line supervisor is black.

(d) There are no blacks among approximately 65 lieutenants in the Department.

(e) There are no blacks among approximately 25 captains in the Department.

(f) There are no black officers assigned to the Homicide, General Investigations (Robbery), Hackney, or Organized Crime Units.

(g) There is only 1 black officer of approximately 20 to 30 officers assigned to the Vice Unit.

(h) There are no black officers currently holding provisional promotions.

16. Black officers have been and are similarly being denied equal opportunity with whites regarding non-civil service appointments within the Department:

(a) Of approximately 248 detectives, only 11, or 4.4% are black. Detective jobs provide greater pay and upward mobility than many other patrol officer assignments.

(b) There are no blacks among approximately 30 detective sergeants.

(c) There are no blacks among approximately 8 detective lieutenants.

(d) Two of the deputy superintendents in the Department are black. Both of these men hold the permanent rank of sergeant.

(e) None of the 4 superintendents in the Department is black.

17. Eligibility for promotion up to and including the rank of captain in the Boston Police Department depends upon the results of an unvalidated testing process developed and administered by the defendant Personnel Administrator of the Massachusetts Division of Personnel Administration. In the past, the process consisted of three parts: (1) a written examination, (2) a graded oral interview which, as of the 1977 test was replaced by a so-called "practical exercise" (consisting of a written test and a career interview), and (3) a score assigned for training and experience. Applicants are placed on a so-called eligible list in the order of their composite scores.

18. In the sergeant's promotional test administered in November 1974, the different components were weighed as follows: written examination, 50%; training and experience, 25%; oral examination, 25%. Only those receiving a cumulative score of 70 or above were placed on the eligible list of persons certified for promotion. While 17% of the white police officers who took the November 1974 sergeant's test have been promoted to sergeant, only 8% of the black police officers who took the same test have been promoted to sergeant.

(a) A total of 650 police officers took the test, 625 (96.2%) of whom were white and 25 (3.8%) of whom were black. 200 whites and 5 blacks received scores of 70 or above; thus, 97.6% of the officers who passed the test were white and only 2.4% of the officers who passed the test were black. 32% of the white officers taking the test were placed on the eligible list while only 20% of the black officers taking the test were placed on the eligible list.

(b) To date, approximately 106 officers from this eligible list have been promoted to the rank of sergeant, 104 of whom are white and 2 of whom are black. 53% of the white police officers placed on the eligible list have been promoted to sergeant, whereas only 40% of the black police officers placed on the eligible list have been promoted to sergeant.

19. A 1977 sergeant's testing procedure has been administered, the components of which are being weighted as follows: written exam (administered on February 12, 1977), 50%; practical exercises, 35%; training and experience, 15%.

20. On information and belief, approximately 440 individuals took the written exam portion of the 1977 sergeant's test, of whom 44 (10%) are black and 396 (90%) are white. Scores for the practical exercise and training and experience are currently being calculated and an eligible list is expected imminently.

21. On information and belief, approximately 66 persons (15%) of those taking the written exam portion of the 1977 sergeant's test received passing scores of 70% or above. Out of this 66, only 2 (3%) are black, and 64 (97%) are white. Thus, of those officers taking the written exam, 16% of the whites passed, and only 4.5% of the blacks passed.

22. Two lieutenant's promotional tests were administered in 1976. Prior to that the last lieutenant's exam had been given in June 1971. Applicants were required to be sergeants with at least one year time-in-grade. The second 1976 lieutenant's test was given approximately 23 days before the only two black sergeants in the Boston Police Department had accumulated the requisite one-year seniority. The precipitous timing of the second 1976 lieutenant's test effectively eliminated the likelihood of promotion to lieutenant for the black sergeants since it is unlikely that a new lieutenant's test will be given in the near future. Such action constituted an act of intentional discrimination against the plaintiff class which was taken with actual knowledge of the adverse impact it would have on the Department's black sergeants.

23. Plaintiffs Celester, Howard and other members of MAAAP underwent the 1977 sergeant's testing process. On information and belief, the eligible list resulting therefrom will be issued imminently and will replace the current eligible list, thereby depriving plaintiff Celester and other black officers seeking promotion of an opportunity for promotion and irreparably harming them. If plaintiff Howard is placed lower on the new eligible list than his position on the current eligible list, he will also suffer irreparable harm.

Statement of Claims.

Count I: For violation of Title VII of the Civil Rights Act of 1964.

24. This court has jurisdiction over this action under 42 U.S.C. §2000e-5(f) and 28 U.S.C.§1343(4). This is an action in

equity seeking relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. ("Title VII"). Declaratory relief is sought under 28 U.S.C. §§2201 and 2202. The rights to be vindicated in this action are rights secured by 42 U.S.C. §§2000e et seq., providing for injunctive and other relief against discrimination in employment based on race and color, among other things.

25. All conditions precedent to jurisdiction under 42 U.S.C. §2000e-5(f)(3) have occurred or been complied with, to wit:

> (a) Charges of employment discrimination were filed with the Equal Employment Opportunity Commission within 180 days of the commission of the unfair employment practices complained of herein.
>
> (b) Notifications of Right to Sue were received from the Equal Employment Opportunity Commission on January 3, 1978; (true copies are attached as Exhibit A).
>
> (c) This complaint has been filed within 90 days of receipt of the Notifications of Right to Sue.

26. The allegations of paragraphs 3 through 23 of this complaint are incorporated herein by reference. The defendants have engaged and continue to engage in unlawful employment practices and policies limiting the employment and promotional opportunities of black police officers in the Department on account of their race and color, as more fully alleged above, in violation of Section 703 of Title VII, 42 U.S.C. §2000e-2.

27. The effect of the discriminatory policies and practices complained of above have been to deprive black officers in the Department of equal employment opportunities because of their race and color.

28. As a further result of the defendants' above-stated actions, plaintiffs and the class they represent have been and are being deprived of income in the form of wages and of prospective retirement benefits, Social Security and other benefits due to them as employees solely because of their race and color, in a sum to be proven at trial.

29. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendants' policies, practices, customs, and usages as set forth above. Plaintiff's and the class they represent have no adequate remedy at law.

Count II: For discrimination in a federally assisted program.

30. This Court has jurisdiction over this action under 28 U.S.C. §1343. This is an action in equity seeking relief under 42 U.S.C. §1983. Declaratory relief is sought under 28 U.S.C. §§2201 and 2202. The rights to be vindicated in this action are rights secured by Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, providing for equal rights and for the protection of civil rights.

31. The allegations of paragraphs 3 through 23 of this complaint are incorporated herein by reference.

32. The defendants Boston Police Department, Jordan and White, have applied for, received, and employed federal financial assistance (from the Law Enforcement Assistance Administration ["LEAA"] of the United States Department of Justice) in pursuing the activities of the Department listed in paragraph 6 of this complaint. Said defendants have applied for and either have received or shortly will receive and will continue to receive further federal financial assistance from the LEAA to be used in pursuing such activities.

33. By reason of the facts alleged above, and particularly by reason of the use of federal financial assistance by defendants Jordan, White and the Department in support of their racially discriminatory employment practices and policies in the Department, the rights of plaintiffs and the class they represent, under 42 U.S.C. §2000d, have been and will continue to be violated, and plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury. Plaintiffs and the class they represent have no adequate remedy at law.

34. As a further result of the defendants' above-stated actions, plaintiffs and the class they represent have been and are being deprived of income in the form of wages and of prospective retirement benefits, Social Security and other benefits due to them as employees solely because of their race and color, in a sum to be proven at trial.

Count III: For violation of the Civil Rights Acts in 1871.

35. This Court has jurisdiction over this action under 28 U.S.C. §§1343(3). This is an action in equity authorized by 42 U.S.C. §1983. Declaratory relief is sought under 28 U.S.C. §§2201 and 2202. The rights, privileges and immunities sought to be vindicated in this action are rights, privileges and immunities guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.;* and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*. The matter in controversy exceeds the sum of $10,000 exclusive of interest and costs.

36. The allegations of paragraphs 3 through 23 of this complaint are incorporated herein by reference.

37. The defendants, under color of state law, intentionally have engaged and intentionally continue to engage in unlawful employment practices and policies limiting the employment and promotional opportunities of black police officers in the Department on account of their race and color, as more fully alleged above.

38. The effect of the discriminatory policies and practices complained of above has been to deprive black officers in the Department, under color of state law and because of their race and color, of due process, the equal protection of the laws, the right to make and enforce contracts, participation in a program or activity receiving Federal financial assistance, and equal employment opportunities.

39. As a further result of the defendants' above-stated actions, plaintiffs and the class they represent have been and are being deprived of income in the form of wages and of prospective retirement benefits, Social Security and other benefits due to them as employees solely because of their race and color, in a sum to be proven at trial.

40. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendants' policies and practices as set forth above. Plaintiffs and the class they represent have no adequate remedy at law.

Count IV: For violation of the Civil Rights Acts of 1870.

41. This Court has jurisdiction over this action under 28 U.S.C. §§1343(3). This is an action in equity authorized by 42 U.S.C. 1981. Declaratory relief is sought under 28 U.S.C. §§2201 and 2202. The right sought to be vindicated in this action is the right to make and enforce contracts to the same extent as is enjoyed by white citizens. The matter in controversy exceeds the sum of $10,000 exclusive of interest and costs.

42. The allegations of paragraphs 3 through 23 of this complaint are incorporated herein by reference.

43. The defendants, under color of state law, intentionally have engaged and intentionally continue to engage in unlawful employment practices and policies limiting the employment and promotional opportunities of black police officers in the Department on account of their race and color, as more fully alleged above.

44. The effect of the discriminatory policies and practices complained of above has been to deprive black officers in the Department, under color of state law and because of their race and color, of the right to make and enforce contracts to the same extent as is enjoyed by white citizens.

45. As a further result of the defendants' above-stated actions, plaintiffs and the class they represent have been and

are being deprived of income in the form of wages and of prospective retirement benefits, Social Security and other benefits due to them as employees solely because of their race and color, in a sum to be proven at trial.

46. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendants' policies and practices set forth above. Plaintiffs and the class they represent have no adequate remedy at law.

Count V: For violation of 42 U.S.C. §1988.

47. This Court has jurisdiction over this action under 42 U.S.C. §1343. This is an action in equity seeking relief under 42 U.S.C. §1988. Declaratory relief is sought under 28 U.S.C. §§2201 and 2202. The rights sought to be vindicated in this action are rights secured by Mass. Gen. Laws, c. 31, § 10, requiring that questions in civil service examinations shall relate to matters which will fairly test the fitness of the applicants actually to perform the duties of the positions for which they apply; Mass. Gen. Laws c. 151B, prohibiting discrimination in employment based on race and color; and Article I, Part the First, Constitution of Massachusetts, guaranteeing equal protection of the laws.

48. The allegations of paragraphs 3 through 23 of this complaint are incorporated herein by reference.

49. The defendants intentionally have engaged and continue to engage in unlawful employment practices and policies limiting the employment and promotional opportunities of black police officers in the Department on account of their race and color and intentionally have and intentionally continue to administer civil service examinations for promotions in the Department which do not fairly test the fitness of plaintiffs and the class they represent actually to perform the duties of the positions for which they apply, all as more fully alleged above.

50. The effect of the policies and practices complained of above has been to test unfairly the fitness of plaintiffs and the

class they represent actually to perform the positions for which they apply and to deprive plaintiffs and the class they represent of equal employment opportunities and of equal protection of the laws because of their race and color.

51. As a further result of the defendants' above-stated actions, plaintiffs and the class they represent have been and are being deprived of income in the form of wages and of prospective retirement benefits, Social Security and other benefits due to them as employees solely because of their race and color, in a sum to be proven at trial.

52. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from defendants' practices and policies as set forth above. Plaintiffs and the class they represent have no adequate remedy at law.

Count VI: For pendent jurisdiction over state claims.

53. This Court has jurisdiction over this action under principles of pendent jurisdiction. Declaratory relief is sought under 28 U.S.C. §§2201 and 2202. The rights to be vindicated in this action are rights secured by Mass. Gen. Laws, c. 31, § 10, requiring that questions in civil service examinations shall relate to matters which will fairly test the fitness of the applicants actually to perform the duties of the positions for which they apply; Mass. Gen. Laws, c. 151B, prohibiting discrimination in employment based on race and color, and Article I, Part the First, Constitution of Massachusetts, guaranteeing equal protection of the laws.

54. The allegations of paragraphs 48 through 52 of this complaint are incorporated herein by reference.

Relief.

WHEREFORE, plaintiffs respectfully request that the Court:

1. Determine and declare that this action may be maintained as a class action.

2. Enter a declaratory judgment that the defendants' employment practices and policies described herein constitute a violation of rights guaranteed to the plaintiffs and their class by the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §1981, 42 U.S.C. §1983, Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d *et seq.*), Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*), regulations promulgated by the Attorney General of the United States under 42 U.S.C. §3701 *et seq.* (28 C.F.R. §42.201 *et seq.*), 42 U.S.C. §1988, Mass. Gen. Laws, c. 31, §10, Mass. Gen. Laws, c. 151B, and Article I, Part the First, Constitution of Massachusetts.

3. Issue a temporary restraining order, and upon hearing a preliminary injunction, restraining, enjoining and prohibiting defendant Kountz, his agents, employees, successors in office and all persons acting in concert or participation with them or any one of them, from certifying any eligible list for promotion in the Boston Police Department which is based on examinations and criteria which exclude a disproportionate number of black officers and which have not been professionally demonstrated to be valid or job-related.

4. Issue a temporary restraining order, and upon hearing a preliminary injunction, restraining, enjoining and prohibiting defendants, their agents, employees, successors in office and all persons acting in concert or participation with them or any one of them from:

> (a) using as the basis for promotions in the Boston Police Department, except according to a method ordered by the Court, any eligible list for promotion which is based on examinations and criteria which have excluded a disproportionate number of black officers and which have not been professionally demonstrated to be valid or job-related; and
> (b) destroying written examinations, exam papers, or any other records of the results of any of the procedures used for processing candidates for promotion in the Boston Police Department.

5. Issue a preliminary, and upon final hearing, a permanent injunction restraining, enjoining and prohibiting defendants, their agents, employees, successors in office and all persons acting in concert or participation with them or any one of them, from:

(a) failing or refusing to promote black officers in the Boston Police Department in the same manner and at the same rate as comparably trained and qualified white officers;

(b) engaging in the following practices and others which discriminate against black officers seeking promotion within the Boston Police Department:

(1) using written examinations which disqualify a disproportionately high number of black officers as compared to white officers and which have not been demonstrated to be valid or predictive of job performance;

(2) ranking and using test scores for determining eligibility and certification for promotion without first establishing that the rankage system used is validly predictive of the relative job performance of the applicants as ranked;

(3) using seniority as a factor in determining eligibility for promotion in the Department so as to deny promotion to otherwise qualified black police officers;

(4) arbitrarily selecting passing scores for promotional tests or portions thereof in the Department without first establishing that the passing score is validly predictive of job performance;

(5) using interview panels in Departmental promotional tests which do not have black members and which are not guided by meaningful standards in determining whether an officer would be likely to perform well the position applied for;

(6) destroying written examinations, exam papers, papers and other records of the results of the promotional screening procedures and refusing to review such written examinations and other results with individual applicants.

(c) using as conditions, prerequisites or criteria for promotion any test, examination, investigation, interviewing process or other factor which has not been professionally developed and demonstrated to be valid as being predictive of or significantly related to the ability of a police officer to perform at a particular rank and which disqualifies from promotion a disproportionately high number of black police officers;
(d) continuing to utilize any promotional eligible list which was determined by examinations, criteria, conditions, or other factors which discriminate on the basis of race, color, or national origin;
(e) failing to assign black officers to jobs offering increased pay and upward mobility in the same manner and at the same rate as comparably trained and qualified white officers;
(f) maintaining or allowing to continue an atmosphere and conditions of harassment and insult and failing to take positive and appropriate steps to correct such atmosphere and conditions;
(g) failing to hire or promote black officers to positions of authority and decision-making positions because of their race and color;
(h) failing duly to adopt and maintain grievance procedures in order to insure that cases in which discrimination is alleged are given due consideration;
(i) failing to remedy unequal retirement pay resulting from salary inequities and slower rates of promotion for black officers;
(j) failing and refusing to assign black officers to job positions because of their race and color;
(k) discriminatorily assigning a disproportionately high number of black officers to inferior job positions;
(l) failing and refusing to implement the Department's Affirmative Action Plan of January 1, 1977, as amended by the Court, to provide effective relief to plaintiffs and the class they represent;
(m) receiving, disbursing or in any way utilizing financial assistance from the Law Enforcement Assistance Administration or any other federal agency, until the de-

fendants comply with the LEAA equal employment guidelines and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, and otherwise correct all employment policies and practices which discriminate against black police officers.

6. Issue a preliminary, and upon final hearing, a permanent injunction ordering defendants, their agents, employees, successors in office and all persons acting in concert with them to:

(a) promote the individually-named plaintiffs and all appropriate members of the class they represent to the rank of sergeant in the Boston Police Department;
(b) devise and submit for the Court's approval a workable plan designed to redress past discrimination against black police officers of the Boston Police Department through priority promotions of qualified black police officers.

7. Order defendants to make whole those persons adversely affected by the policies and practices described herein by providing appropriate back pay and reimbursement for lost pension, Social Security, experience, training opportunities and other benefits in an amount to be shown at trial.

8. Enter judgment in favor of the individually-named plaintiffs and all appropriate members of the class they represent and against defendants for all monetary damages which the Court finds have been sustained as a result of defendants' wrongful acts.

9. Allow plaintiffs and the class they represent their costs, disbursements, and reasonable attorneys' fees incurred in this action.

10. Retain jurisdiction over this action to assure full compliance with the orders of the Court and with applicable law and require defendants to file such reports as the Court deems necessary to evaluate such compliance.

11. Grant such additional relief as the court deems proper and just.

By their attorneys,

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Lawyers' Committee for Civil
Rights Under Law of the
Boston Bar Association

By: _____
Judith S. Bernstein

Mark S. Brodin

Appendix D

United States District Court
For the District of Massachusetts

MASSACHUSETTS ASSOCIATION OF
AFRO-AMERICAN POLICE, INC.
et al.,

Plaintiffs

v. C.A. No. 78-529-F

THE BOSTON POLICE DEPARTMENT,
et al,

Defendants

ANSWER OF DEFENDANTS KOUNTZE, MICLETTE, LINDEN, DONEGAN, MacROBERT, AND BUDD

Defendants Kountze, Miclette, Linden, Donegan, MacRobert and Budd (state defendants) answer the numbered allegations of the complaint as follows:

I. *Nature of this Action.*

1. The state defendants deny that as a consequence of the alleged denial of equal employment activities, black officers have been and continue to be restricted to the lower echelons of the Boston Police Department (Department) and have been denied higher pay and status within the Department. The remaining allegations in paragraph one constitute a statement of the action, requiring no answer.

II. *Venue and Jurisdiction.*

2. The state defendants deny that the unlawful employment practices complained of in the complaint were and are being committed in the Commonwealth of Massachusetts. The remaining allegations in paragraph two are admitted.

III. *Parties.*

A. *Plaintiffs*

3. The state defendants deny that MAAAP's members have suffered and will continue to suffer immediate and irreparable injury as a result of the defendants' use of discriminatory practices or promotional policies. The defendants have insufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in paragraph three.

4(a). To the extent that the allegations contained in paragraph four (a) assert that William Celester is and at all relevant time has been an employee of the Boston Police Department as that term is defined in 42 U.S.C. § 2000e (f), they are conclusions of law requiring no answer. The state defendants admit that he is a 34 year old black citizen of the United States and a Massachusetts resident. The state defendants have insufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in paragraph four (a).

(b). The state defendants admit that Mr. Celester joined the Boston Police Department on August 28, 1968, and has served in the entry-level position of patrol officer since that time. The state defendants have insufficient knowlege or information to form a belief as to the truth of the remaining allegations contained in paragraph four (b).

(c). The state defendants admit the allegations contained in paragraph four (c).

Further answering said allegations the state defendants assert that promotions to the rank of sergeant from the pool of individuals who took the November 1974 test were made in the order of the composite scores achieved by the individuals and that no promotions were made from the group of individuals with scores below 87%.

(d). The state defendants admit the allegations contained in paragraph four (d).

(e). The state defendants deny the allegations contained in paragraph four (e).

5 (a). To the extent that the allegations contained in paragraph five (a) assert that plaintiff Roy Howard is and at all relevant times has been an "employee" of the Boston Police Department as that term is defined in 42 U.S.C. § 2000e (f) they are conclusions of law requiring no answer. The state defendants admit that plaintiff Howard is a Massachusetts resident and a high school graduate. The state defendants have insufficient knowledge or information to form a belief as to the remaining allegations contained in paragraph five (a).

(b). The state defendants admit that Mr. Howard joined the Boston Police Department on October 10, 1970, and has remained in the entry-level position of patrol officer since that time. The state defendants have insufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in paragraph five (b).

(c). The state defendants admit the allegations contained in paragraph 5 (c). Further answering said allegations the state defendants assert that promotions to the rank of sergeant from the pool of individuals who took the November, 1974 test were made in the order of the composite grades achieved by the individuals and that no promotions were made from the group of individuals with scores below 87%.

(d). The state defendants admit the allegations contained in paragraph five (d).

(e). The state defendants deny the allegations contained in paragraph five (e).

B. *Defendants.*

6. To the extent that the allegations contained in paragraph six assert that the defendant Boston Police Department (the "Department") is now and at all relevant times has been a government agency within the meaning of 42 U.S.C. § 2000 e (a), organized pursuant to the City of Boston Code, Statutes, Title II, § 1, they are conclusions of law requiring no answer. The state defendants admit the remaining allegations contained in paragraph six.

7. The allegations contained in paragraph seven are conclusions of law requiring no answer.

8. The state defendants admit that defendant Joseph Jordan is the Commissioner of the Boston Police Department. The remaining allegations of paragraph eight are conclusions of law requiring no answer.

9. The state defendants admit that defendant Kevin H. White is the Mayor of the City of Boston. The remaining allegations contained in paragraph nine are conclusions of law requiring no answer.

10. The state defendants admit that Wallace Kountze is the Personnel Administrator of the Massachusetts Division of Personnel Administration. The remaining allegations contained in paragraph ten are conclusions of law requiring no answer.

11. The state defendants admit that defendants Amelia Miclette, Richard H. Linden, John T. Donegan, Ruth M. MacRobert, and Wayne A. Budd are members of and constitute the Massachusetts Civil Service Commission (the "Commission"). The remaining allegations contained in paragraph eleven are conclusions of law, requiring no answer.

12. The state defendants admit the first two sentences contained in paragraph twelve. Further answering said allega-

tions the state defendants assert that while civil service rules and testing procedures promulgated by defendants Kountze and the defendant members of the Commission govern promotions in rank for police officers in the Department, these rules and procedures do not eliminate all discretion on the part of the Department in promoting police officers.

The state defendants admit that other job assignments in the Department are subject to the authority of defendants Jordan and White.

The remaining allegations contained in paragraph twelve are conclusions of law requiring no answer.

IV. *Class Action Allegation.*

13(a). The allegations contained in paragraph thirteen (a) are a statement of the nature of the case requiring no answer.

(b)-(c) To the extent that the allegations contained in paragraph thirteen (b) through (c) are factual assertions, they are denied. To the extent that the allegations contained in paragraph thirteen (b) are assertions of law, they require no answer.

(d) The state defendants deny that the named individual plaintiffs have each been discriminated against both in the past and the present and that the conditions of employment of which they complain apply equally to all members of the class. The remaining allegations contained in paragraph thirteen (d) are conclusions of law, requiring no answer.

V. *Background Allegations*

14. To the extent that the allegations contained in paragraph 14 are directed to the state defendants, these allegations are denied. The state defendants have insufficient knowledge and information to form a belief as to the truth of the remaining allegations contained in paragraph fourteen.

15. The state defendants deny that black officers are excluded from the higher echelons of the Department and are denied higher pay and status within the Department.

The state defendants deny the allegations contained in paragraphs fifteen (a), (b) and (c). The state defendants admit the allegations contained in paragraphs fifteen (d), (e), (f), (g) and (h). Further answering said allegations the state defendants assert that there are no police officers holding provisional promotions within the Boston Police Department.

16. The state defendants have insufficient knowledge or information to form a belief as to the allegations contained in paragraph sixteen.

17. The state defendants deny plaintiffs' characterization of the testing process as unvalidated and developed solely by the defendant Personnel Administrator of the Massachusetts Division of Personnel Administration.

The state defendants admit that eligibility for promotion up to and including the rank of captain in the Boston Police Department depends upon the results of a testing process administered by the defendant Personnel Administrator.

The state defendants admit that the "process" consisted of three parts, but deny plaintiffs' implication that this process is an unvalidated one.

The remaining allegations contained in paragraph seventeen are admitted except to the extent that the plaintiffs assert applicants are placed on a so-called eligible list. Further answering said allegations, the state defendants assert that only applicants receiving a passing grade are placed on the so-called eligibility list.

18. The state defendants admit the first two sentences contained in paragraph eighteen. The state defendants deny the allegations in the last sentence of paragraph eighteen.

(a) The state defendants admit that a total of 650 police officers took the test.

The state defendants deny that 625 (19.2%) of those taking the exam were white and 25 (3.8%) of those taking the exam

were black. The state defendants further deny that 200 whites and 5 blacks received scores of 70 or above and that 97.6% of the officers who passed the test were white and only 2.4% of the officers who passed the test were black. The state defendants deny the allegations contained in the last sentence of paragraph eighteen (a).

(b) The state defendants admit the allegations contained in the first sentence of paragraph eighteen (b). The state defendants deny the remaining allegations contained in paragraph eighteen (b).

19. The state defendants admit the allegations contained in paragraph nineteen.

20. The state defendants deny the allegations contained in paragraph twenty.

21. The state defendants admit the allegations contained in the first two sentences of paragraph twenty-one. The state defendants deny the allegations contained in the last sentence of paragraph twenty-one.

22. The state defendants admit the first three sentences in paragraph twenty-two. The state defendants deny the allegations contained in the fourth sentence of paragraph twenty-two.

To the extent that the allegations contained in the fifth sentence of paragraph twenty-two characterize the second 1976 lieutenant's test as "precipitiously timed" they are denied. To the extent that the allegations contained in the fifth sentence of paragraph twenty-two assert that the timing of the second 1976 lieutenant's test effectively eliminated the likelihood of promotion to lieutenant for black sergeants since it is unlikely that a new lieutenant's test will be given in the future, the state defendants have insufficient or information to form a belief as to the truth of these allegations.

The state defendants deny the allegations contained in the last sentence of paragraph twenty-two.

23. The state defendants admit that plaintiffs Celester and Howard underwent the 1977 sergeant's testing process. The state defendants have insufficient knowledge to form a belief

as to whether other members of MAAAP underwent the 1977 sergeant's testing process and whether the eligible list resulting therefrom will be issued imminently and will replace the current eligible list.

The state defendants deny that the issuance of an eligible list resulting from the 1977 sergeant's testing process will deprive plaintiff Celester and other black officers seeking promotion of an opportunity for promotion.

To the extent that the allegations contained in paragraph twenty-three assert that the issuance of an eligible list resulting from the 1977 sergeant's testing process will irreparabley harm plaintiffs Celester and the other black officers seeking promotion and plaintiff Howard, if he is placed lower on the new eligible list than his position on the current eligible list, are conclusions of law requiring no answer.

Count I: *For violation of Title VII of the Civil Rights Act of 1964.*

24. The allegations contained in the first sentence of paragraph twenty-four are conclusions of law requiring no answer. The remaining allegations contained in paragraph twenty-four constitute a statement of the nature of the case, requiring no answer.

25. To the extent that the allegations contained in paragraph twenty-five assert that all conditions precedent to jurisdiction under 42 U.S.C. § 2000e-5(f) (3) have occurred or been complied with, they are conclusions of law, requiring no answer.

(a) The state defendants have insufficient knowledge or information to form a belief as to whether charges of employment discrimination were filed with the Equal Employment Opportunity Commission within 180 days of the commission of alleged unfair employment practices complained of herein.

(b)-(c) The state defendants admit the allegations contained in paragraph twenty-five (b)-(c).

26. To the extent that the allegations contained in paragraphs three through twenty-three of the complaint are incorporated herein by reference, the state defendants incorporate their answers to the allegations of paragraph three through twenty-three by reference. The state defendants deny the remaining allegations contained in paragraph twenty-six.

27-28. The state defendants deny the allegations contained in paragraphs twenty-seven through twenty-eight.

29. The state defendants deny the allegations contained in the first sentence of paragraph twenty-nine. To the extent that the plaintiffs allege that the plaintiffs and the class they represent have no adequate remedy at law, they are conclusions of law requiring no answer.

Count II: *For Discrimination in a Federally Assisted Program.*

30. To the extent that the allegations contained in paragraph thirty assert that this is an action in equity seeking relief under 42 U.S.C. § 1983 and that declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202, they constitute a statement of the nature of the case requiring no answer. The remaining allegations contained in paragraph thirty are conclusions of law requiring no answer.

31. The state defendants incorporate by reference their responses to the allegations contained in paragraph three through twenty-three.

32. The state defendants have insufficient knowledge or information to form a belief concerning the truth of the allegations contained in paragraph thirty-two.

33. To the extent of the allegations contained in paragraph thirty-three assert that the plaintiffs and the class they represent have no adequate remedy at law, they are conclusions of law requiring no answer. The state defendants deny the remaining allegations in paragraph thirty-three.

34. The state defendants deny the allegations contained in paragraph thirty-four.

Count III: *For Violation of the Civil Rights Acts of 1971.*

35. To the extent that the allegations contained in paragraph thirty-five assert that declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202, they constitute a statement of the nature of the case, requiring no answer. The remaining allegations contained in paragraph thirty-five are conclusions of law requiring no answer.

36. The state defendants incorporate by reference their responses to the allegations contained in paragraphs three through twenty-three.

37-39. The state defendants deny the allegations contained in paragraphs thirty-seven through thirty-nine.

40. To the extent that the allegations contained in paragraph forty assert that plaintiffs and the class they represent have no adequate remedy at law, they are conclusions of law requiring no answer. The state defendants deny the remaining allegations contained in paragraph forty.

Count IV: *Violation of The Civil Rights Acts of 1870.*

41. To the extent that the allegations contained in paragraph forty-one assert that delcaratory relief is sought under 28 U.S.C. §§ 2201 and 2202, and that the right sought to be vindicated in this action is the right to make and enforce contracts to the same extent as is enjoyed by white citizens, they constitute a statement of the nature of the case requiring no answer. The remaining allegations contained in paragraph forty-one are conclusions of law requiring no answer.

42. The state defendants incorporate by reference their responses to the allegtions contained in paragraphs three through twenty-three of the complaint.

43-45. The state defendants deny the allegations contained in paragraphs forty-three through forty-five of the complaint.

46. To the event that the allegations contained in paragraph forty-six assert that the plaintiffs and the class they represent have no adequate remedy at law, they are conclusions of law requiring no answer. The state defendants deny the remaining allegations contained in paragraph forty-six.

Count V: *For Violation of 42 U.S.C. § 1988.*

47. To the extent that the allegations contained in paragraph forty-seven assert that this is an action in equity seeking relief under 42 U.S.C. § 1988 and that declaratory relief is sought under 28 U.S.C § 2201 and 2202, they are a statement of the nature of the case requiring no answer. The remaining allegations contained in paragraph forty-seven are conclusions of law requiring no answer.

48. The state defendants incorporate by reference their responses to the allegations contained in paragraphs three through twenty-three of the complaint.

49-51. The state defendants deny the allegations contained in paragraphs forty-nine through fifty-one.

52. To the extent that the allegations contained in paragraph fifty-two of the complaint assert that plaintiffs and the class they represent have no adequate remedy at law, they are conclusions of law requiring no answer. The state defendants deny the remaining allegations contained in paragraph fifty-two.

Count VI: *For Pendant Jursidiction Over State Claims.*

53. To the extent that the allegations contained in paragraph fifty-three assert that declaratory relief is sought under 28 U.S.C. §§ 2201 ad 2202, they are a statement of the nature of the case requiring no answer. The remaining allegations contained in paragraph fifty-three are conclusions of law requiring no answer.

54. The state defendants incorporated by reference the allegations contained in paragraphs forty-three through fifty-two of the complaint.

Defenses

By way of further answer and reply to the various allegations of the complaint, the state defendants assert the following defenses.

First Defense

1. The statistical allegations set forth in the plaintiffs' complaint fail to establish a *prima facie* case of racial discrimination.

Second Defense

2. The named plaintiffs do not have standing to raise all of the claims made on behalf of the class which the plaintiffs seek to have certified.

Third Defense

3. The civil service procedures for promotion of Boston police patrolmen up to and including the rank of captain are valid in that they are substantially related to the ability of applicants to perform the duties of the positions to which the patrolmen seek promotion.

Fourth Defense

4. The state defendants have not engaged in acts of intentional discrimination as required to establish a violation of 42 U.S.C. §§ 2000e *et seq.* in regard to government agencies and a violation of the Fourteenth Amendment to the United States Constitution.

Fifth Defense

5. The provisions of 42 U.S.C. §§ 2000e *et seq.* under which plaintiffs bring this suit are unconstitutional because Congress does not have the power to regulate local government employee-employer relations beyond the requirements of the Fourteenth Amendment.

Sixth Defense

6. Insofar as the plaintiffs' claim that the state defendants have violated 42 U.S.C. §§ 2000e *et seq.* is concerned, neither the Division of Personnel Administration nor the Civil Service Commission is an employer or an employment agency as those terms are defined in 42 U.S.C. § 2000e (b) and § 2000e (c).

By their attorneys,

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Dated: June 9, 1978

Appendix E

United States District Court
District of Massachusetts

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., ET. AL
Plaintiffs

v. CIVIL ACTION
NO. 78-529-F

THE BOSTON POLICE DEPARTMENT, ET. AL.
Defendants

ANSWER OF DEFENDANTS BOSTON POLICE DEPARTMENT, JOSEPH JORDAN AND KEVIN H. WHITE

1. Defendants deny the allegations of paragraph 1 of the complaint.
2. Defendants deny the allegations of paragraph 2 of the complaint.
3. Defendants state that they are without knowledge sufficient to form a belief as to the truth of the allegations of the first 3 sentences of paragraph 3 of the complaint. Defendants deny the allegations in the remainder of paragraph 3 of the complaint.
4. Defendants admit the allegations of paragraph 4 (a) of the complaint. Defendants admit the allegations of the first 3 sentences of paragraph 4 (b) of the complaint. Defendants are without knowledge sufficient to form a belief as to the allegations contained in the last sentence of paragraph 4 (b) of the complaint. Defendants admit the allegations contained in paragraph 4 (c) of the complaint. Plaintiffs admit the allegations of paragraph 4(d) of the complaint. Defendants deny the allegations of paragraph 4(e) of the complaint.

5. Defendants admit the allegations of the first 3 sentences of paragraph 5 (a) of the complaint. Defendants are without knowledge sufficient to form a belief as to the truth of the allegations contained in the last sentence of paragraph 5 (a) of the complaint. Defendants admit the allegations of paragraph 5 (b) (c) (d) of the complaint. Defendants deny the allegations of paragraph 5 (e) of the complaint.

6. Defendants admit the allegations contained in paragraph 6 of the complaint.

7. Defendants deny the allegations contained in paragraph 7 of the complaint.

8. Defendants admit the allegations contained in paragraph 8 of the complaint.

9. Defendants admit the allegations contained in paragraph 9 of the complaint.

10. Defendants admit the allegations contained in paragraph 10 of the complaint.

11. Defendants admit the allegations contained in paragraph 11 of the complaint.

12. Defendants admit the allegations contained in paragraph 12 of the complaint.

13. Defendants deny the allegations of paragraph 13 (a) (b) (c) (d) of the complaint.

14. Defendants deny the allegations of paragraph 14 (a) through (p) of the complaint.

15. Defendants deny the allegations of the first sentence of paragraph 15 of the complaint. Defendants deny the allegations of paragraph 15 (a) (b) (c) of the complaint. Defendants admit the allegations of paragraph 15 (d) (e) (f) (g) of the complaint. Defendants admit the allegations of paragraph 15 (h) of the complaint, and further state that there are no police officers holding provisional promotions within the Boston Police Department at the present time.

16. Defendants deny the allegations contained in the first sentence of paragraph 16 of the complaint. Defendants deny the allegations contained in paragraph 16 (a) of the complaint. Defendants admit the allegations of paragraph 16 (b) (c) (d) (e) of the complaint.

17. Defendants deny the allegations of paragraph 17 of the complaint.

18. Defendants admit the allegations of the first 2 sentences of paragraph 18 of the complaint. Defendants deny the allegations of the last sentence of paragraph 18 of the complaint. Defendants deny the allegations of paragraph 18 (a) and (b) of the complaint.

19. Defendants admit the allegations of paragraph 19 of the complaint.

20. Defendants deny the allegations of paragraph 20 of the complaint.

21. Defendants deny the allegations of paragraph 21 of the complaint.

22. Defendants admit the allegations of the first 3 sentences of paragraph 22 of the complaint. Defendants deny the allegations contained in the remainder of paragraph 22 of the complaint.

23. Defendants admit the allegations contained in the first sentence of paragraph 23 of the complaint. Defendants deny the allegations in the remainder of paragraph 23 of the complaint.

24. Defendants neither admit nor deny the allegations of paragraph 24 of the complaint since they are conclusions of law.

25. Defendants deny the allegations of paragraph 25 (a) of the complaint. Defendants admit the allegations of paragraph 25 (b) and (c) of the complaint.

26. Defendants answer the first sentence of paragraph 26 of the complaint by incorporating by reference the answers to paragraph 3 through 23 of the complaint. Defendants deny the allegations of the second sentence of paragraph 26 of the complaint.

27. Defendants deny the allegations of paragraph 27 of the complaint.

28. Defendants deny the allegations of paragraph 28 of the complaint.

29. Defendants deny the allegations of paragraph 29 of the complaint.

30. Defendants neither admit nor deny the allegations contained in paragraph 30 of the complaint since they are conclusions of law.

31. Defendants answer paragraph 31 of the complaint by incorporating by reference their answers to paragraphs 3 through 23 of the complaint.

32. Defendants admit the allegations of paragraph 32 of the complaint.

33. Defendants deny the allegations of paragraph 33 of the complaint.

34. Defendants deny the allegations of paragraph 34 of the complaint.

35. Defendants neither admit nor deny the allegations of paragraph 35 of the complaint since they are conclusions of law.

36. Defendants answer the allegations of paragraph 36 of the complaint by incorporating by reference their answers to paragraphs 3 through 23 of the complaint.

37. Defendants deny the allegations of paragraph 37 of the complaint.

38. Defendants deny the allegations of paragraph 38 of the complaint.

39. Defendants deny the allegations of paragraph 39 of the complaint.

40. Defendants deny the allegations of paragraph 40 of the complaint.

41. Defendants neither admit nor deny the allegations of paragraph 41 of the complaint since they are conclusions of law.

42. Defendants answer the allegations of paragraph 42 of the complaint by incorporating by reference their answers to paragraphs 3 through 23 of the complaint.

43. Defendants deny the allegations of paragraph 43 of the complaint.

44. Defendants deny the allegations of paragraph 44 of the complaint.

45. Defendants deny the allegations of paragraph 45 of the complaint.

46. Defendants deny the allegations of paragraph 46 of the complaint.

47. Defendants neither admit nor deny the allegations of paragraph 47 of the complaint since they are conclusions of law.

48. Defendants answer the allegations of paragraph 48 of the complaint by incorporating by reference their answers to paragraphs 3 through 23 of the complaint.

49. Defendants deny the allegations of paragraph 49 of the complaint.

50. Defendants deny the allegations of paragraph 50 of the complaint.

51. Defendants deny the allegations of paragraph 51 of the complaint.

52. Defendants deny the allegations of paragraph 52 of the complaint.

53. Defendants neither admit nor deny the allegations of paragraph 53 of the complaint since they are conclusions of law.

54. Defendants answer the allegations of paragraph 54 of the complaint by incorporating by reference their answers to paragraphs 48 through 52 of the complaint.

First Defense

The plaintiffs do not have standing to challenge the lieutenant's and captain's promotional exams since none of the named plaintiffs or members of the class were eligible to take the examinations.

Second Defense

The provisions of 42 U.S.C. 2000 d, e et. seq. under which plaintiffs bring suit are unconstitutional because Congress does not have the power to regulate local government employee-employer relations beyond the requirements of the Fourteenth Amendment.

Third Defense

The pleadings of the plaintiffs are insufficient to establish a prima facie case because the statistical sample is too small to be significant, and because the allegations of the complaint fail to account for the Boston Police Department's complying with the requirements of its affirmative action program relating to sworn personnel.

Fourth Defense

The promotional examinations used by the Department since 1971 have not only been prepared by experts but are culturally-unbiased and job-related.

Fifth Defense

The statistical allegations set forth in the plaintiff's complaint fail to establish a prima facie case of racial discrimination.

By their attorney,

Nicholas Foundas
Legal Advisor
Boston Police Department
154 Berkeley Street
Boston, MA 02116
247-4550

Appendix F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION OF AFRO AMERICAN POLICE, INC., et al.,
Plaintiffs

v. CIVIL ACTION NO. 78-529-McN

THE BOSTON POLICE DEPARTMENT, et al.,
Defendants

MOTION TO INTERVENE PURSUANT TO RULE 24(a)

Thomas Burke, Timothy P. Callahan, David Campbell, Keith Carlson, Edward Cavanaugh, Robert Childs, Marcy Corwin, Robert Cunningham, Lawrence Daly, Clifford Dawson, Walter Duggan, Robert Francis, Francis Gaughan, Joseph Griffin, John Jansky, Myles McGrail, Michael W. McWeeny, David Mackin, William O'Connell, John T. Pels, Eugene F. Simpson, Thomas Steiner, George Syms, John S. Tobin, Joseph Wells, and Herbert White ("the applicants for intervention") move pursuant to Rule 24(a) of the Federal Rules of Civil Procedure for leave to intervene as defendants in the above action for the purpose of asserting claims set forth in the attached Motion to Vacate Consent Decree. In the event that this Motion shall be allowed by the Court, the applicants for intervention adopt the answer of the defendant, Boston Police Department.

In support of this motion, the applicants for intervention assert that they have a continuing interest relating to claims asserted in the above-entitled cause, particularly with respect to those claims involving the promotional examination for the position of sergeant in the Boston Police Department and the status of persons certified as eligible for promotion on the 1979 eligible list resulting from the examination held in 1977

and that disposition of the action as set forth in the Consent Decree entered has as a practical matter impaired or impeded their ability to protect that interest, particularly in light of *Firefighters Local Union No. 1784 v. Stotts*, 52 LW 4767. In support of their application for intervention, annexed hereto and incorporated herein by reference is the affidavit of John S. Tobin.

The applicants for intervention assert that they have an interest in the above-entitled action because:

1. As persons who were certified as eligible for promotion to the position of sergeant in the 1979 eligible list referred to in the Consent Decree and who were not promoted to the permanent position of sergeant because the terms of the Consent Decree provided that only twenty-five (25) persons from the list could be appointed, the applicants for intervention have been deprived of seniority in the position of sergeant and each of the applicants has been adversely affected by the Consent Decree entered in the above-entitled action;

2. Insofar as the Consent Decree provided that only twenty-five (25) persons from the 1979 eligible list could be appointed to the permanent position of sergeant, the Consent Decree continues to have a prejudicial impact upon the applicants for intervention depriving them of the continued eligibility provided for in M.G.L. c. 31, § 25, i.e. according to § 25 persons on an eligible list remain eligible for promotion for a period of two (2) years which period may be extended by the defendant Personnel Administrator of the Massachusetts Division of Personnel Administration;

3. The applicants for intervention have been further prejudiced by the Consent Decree with the appointment of acting sergeants in March of 1983 by the defendant Jordan because the applicants for intervention have not been appointed to the permanent position of sergeant within the Boston Police Department when vacancies existed because of the Consent Decree entered in this action;

4. Unless the relief sought is granted by this Court, the applicants for intervention will continue to be prejudiced by the Consent Decree in the event that the promotional examination for the position of sergeant proposed by the defendant Jordan to be held in December of 1984 is held, because the applicants for intervention will be required to requalify for eligibility for promotion to the position of sergeant, having wrongfully been deprived of their promotional rights by virtue of the Consent Decree.

Wherefore, the applicants for intervention move that they be permitted to intervene for the purposes state above.

Regina L. Quinlan
Attorney for the
Applicants for
Intervention
6 Beacon Street
Boston, MA 02108
227-7118

July 25, 1984

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., et al.,
Plaintiffs

v. CIVIL ACTION NO. 78-529 McN

THE BOSTON POLICE DEPARTMENT, et al.,
Defendants

MOTION TO VACATE CONSENT DECREE

Thomas Burke, Timothy P. Callahan, David Campbell, Keith Carlson, Edward Cavanaugh, Robert Childs, Marcy Corwin, Robert Cunningham, Lawrence Daly, Clifford Dawson, Walter Duggan, Robert Francis, Francis Gaughan, Joseph Griffin, John Jansky, Myles McGrail, Michael W. McWeeny, David Mackin, William O'Connell, John T. Pels, Eugene F. Simpson, Thomas Steiner, George Syms, John S. Tobin, Joseph Wells, and Herbert White ("the applicants for intervention") move pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to vacate the Consent Decree entered in the above-entitled cause on the grounds that:

1. The Court exceeded the authority conferred by §706(g) of Title VII in adopting the Consent Decree, particularly those provisions relating to promotions to the permanent position of sergeant of persons on the "1979 list" referred to in said Decree where:

a. There was no finding that the members of the class to be protected, to wit: all present and future black sworn officers in the Boston Police Department, had been actual victims of discrimination, and where it was expressly provided that "the consent of the parties shall in no manner constitute findings on the merits in this action, nor shall it be construed as an admission by

the defendants of any violation of Title VII..." Consent Decree p. 3;

b. In limiting the number of persons to be appointed from the 1979 list and directing the Boston Police Department "to maintain sufficient vacancies in the rank of sergeant to comply with the goals referred to in paragraph 7 of...(the Consent) Decree" exceeds the authority conferred by § 706(g) of Title VII and violates the policy behind § 706(g), i.e. "to provide make-whole relief only to those who have been actual victims of illegal discrimination...." See *Firefighters Local Union No. 1784 v. Stotts,* 52 L.W. 4767, 4772;

2. The Consent Decree is overbroad on its face because it purports to fashion relief for a disadvantaged class without a finding that any member of that class had been an actual victim of illegal discrimination and without identifying any specific employee entitled to particular relief;

3. The Consent Decree is null and void, exceeding the authority conferred in § 706(g) of Title VII;

4. The Consent Decree has wrongfully deprived and continues to deprive the applicants for intervention of rights secured by the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. 2000a-1 and by the laws of the Commonwealth of Massachusetts, particularly M.G.L. c. 31, §§ 7-27 and M.G.L. c. 150E, § 6;

4. The interests of justice require that the Consent Decree be vacated.

Incorporated herein by reference is the Affidavit of John S. Tobin filed with the Motion to Intervene filed herewith, a copy of which is annexed hereto.

Wherefore, the applicants for intervention move that the Consent Decree be vacated and that the Court order that the applicants for intervention be made whole by ordering that they be promoted to the permanent position of sergeant in the Boston Police Department and for such other orders as the Court deems just and proper.

Regina L. Quinlan
Attorney for the
Applicants for
Intervention
6 Beacon Street
Boston, MA 02108
227-7118

Appendix H

AFFIDAVIT OF JOHN S. TOBIN

John S. Tobin, being duly sworn deposes and states on his own behalf and on behalf of the other applicants for intervention that:

1. He and all other applicants for intervention (all of whom are known to him) are white males who are employed as police officers for the Boston Police Department and all were so employed in 1977;

2. On February 12, 1977, the applicants for intervention took a promotional examination for the position of sergeant in the Boston Police Department;

3. As a result of the promotional examination process, each of the applicants for intervention was certified as eligible for promotion on the list established in March of 1979 ("the 1979 eligible list") referred to in the Consent Decree entered in this action;

4. Following the entry of the Consent Decree in this action and in accordance with its provisions, only twenty-five (25) officers from the 1979 eligible list were promoted to the permanent position of sergeant in the Boston Police Department;

5. The applicants for intervention were not among the twenty-five (25) officers so promoted to the permanent position of sergeant;

6. Since the entry of the Consent Decree in the above action, the Boston Police Department has not offered a promotional examination for the position of sergeant despite the existence of vacancies;

7. On or about March 16, 1983, the defendant Jordan, as Police Commissioner, made twenty-four (24) appointments of acting or provisional sergeants (the "acting sergeants") and, upon information and belief, the persons so appointed were selected after the commanding officer of each district submitted names of patrolmen considered qualified and deserving of provisional promotion upon order of the defendant Jordan and after the defendant Jordan reviewed the names of patrolmen so submitted and without reference to the 1979 eligible list;

8. Of the acting sergeants appointed in March of 1983 the only person appointed whose name appeared on the 1979 eligible list is Timothy P. Callahan;

9. On or about May 16, 1984, the defendant Jordan announced that a promotional examination for the position of sergeant would be held by December of 1984.

Signed under pain and penalty of perjury this 19th day of July, 1984.

John S. Tobin

Commonwealth of Massachusetts

Suffolk, ss. July 19, 1984

Then personally appeared the above-named John S. Tobin and executed the foregoing affidavit in my presence, acknowledging that the statements thereof are true to the best of his knowledge and belief,

Before me

Notary Public
My commission expires
8/19/88

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE,INC., et al.,
Plaintiffs

v.

THE BOSTON POLICE DEPARTMENT, et al.,
Defendants

AFFIDAVIT OF LAWRENCE BROWN

I, Lawrence Brown, being duly sworn, depose and state:

1. I am currently a sworn officer in the Boston Police Department. I have held that position since November of 1977. I have personal knowledge of the history of the captioned action and of the terms of the Settlement Agreement and Consent Decree entered therein.

2. Prior to the entry of the Consent Decree, there was extensive media coverage of the terms of the proposed Settlement Agreement and the proposed Consent Decree. Specifically, newspaper articles in the Boston Globe and Boston Herald reported on the terms of the Consent Decree, including the minority hiring goals for the position of sergeant agreed to by the parties. True and accurate copies of a July 10, 1980 Boston Herld article and March 3, 1978 Boston Globe article concerning the institution of the instant action and the terms of the Consent Decree are attached hereto as Exhibits A and B. Local radio stations carried similar coverage of the litigation and the terms of the Decree. In addition, the Consent Decree and the hiring goals it established were common subjects of discussion among members of the Department.

Signed under the pains and penalties of perjury this 14th day of September, 1984.

Lawrence Brown

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. September 14, 1984

Then appeared before me the above-named Lawrence Brown known to me, and having been duly sworn stated that he had read and understood the foregoing Affidavit, that the signature appearing thereon was his and that he signed it as his own free act and deed.

Notary Public
Marianne Brassard
My Commission Expires:
May 6, 1988

EXHIBIT A

Blacks-to-Sergeant Compromise Offered

By James Connolly
Staff Writer

An agreement under which the Boston Police Department would vow to make a good-faith effort to increase the number of black sergeants to become more proportionate to the black population of the city was presented to a federal judge yesterday.

If approved by U.S. District Judge John J. McNaught, the agreement would settle a two-year-old suit in which the Massachusetts Association of Afro-American Police complained that the department's promotional procedures were discriminatory.

McNaught scheduled a Sept. 16 hearing on the consent decree, which was the result of negotiations between attorneys for the city, the state Civil Service Commission and the 200 blacks on the police department.

Currently there are only three blacks among 222 sergeants on the police force, in a city that is more than 20 percent black. Two of the black men who hold the rank of sergeant, however, have the non-Civil Service rank of deputy superintendent.

The agreement sets a goal of 9.2 percent of the sergeants to be blacks by February 1985, when the percentage of blacks on the force is expected to reach 20 percent.

But police department attorney Nicholas Foundas emphasized that the 9.2 percent figure is only a goal. "There have been no quotas that have been agreed to or imposed through the consent decree," he said.

The consent decree could result in the first promotions for patrolmen to sergeant in three years. Foundas noted that the

officers on the promotion list certified in March 1979 have not been promoted in part because of the pending litigation, but also because of budget cutbacks in the department.

While the proposed consent decree does not constitute an admission of discriminatory conduct by the police department in the past, it does call for the department to work with the other parties in the case to ensure that all eligible officers know about upcoming exams and that all exams are "job-related and nondiscriminatory."

Meanwhile, McNaught denied a motion by 26 white sergeants who wanted to intervene in the case, complaining that they are being deprived of promotions to lieutenant because the black officers' case is still pending. McNaught told attorney Michael P. Doherty that the sergeants had no standing in the current matter.

EXHIBIT B

Black Officers Sue Boston Police on Bias in Promotions

By Alan H. Sheehan
Globe Staff

The Boston Police Department policy on promotion discriminates against black police officers, restricting them to lower ranks and pay, it was charged yesterday in a class-action suit filed in U.S. District Court in Boston.

Named as defendants were the department, Police Comr. Joseph Jordan, Mayor Kevin H. White, state Division of Personnel Administrator Wallace Kountz and state Civil Service Commission members, Amelia Miclette, Richard H. Linden, John F. Donegan, Ruth A. MacRobert and Wayne A. Budd.

In a series of allegations, the Massachusetts Assn. of Afro-American Police, Inc., and Patrolmen William Celester and Roy Howard charged that the defendants "...have discriminated against black officers...with respect to wages, assignments, discharge, compensation, promotion, transfer, harassment...because of their race and color."

Judge Frank H. Freedman will hold a hearing at 10:30 a.m. today to consider the plaintiffs' request for a temporary restraining order blocking the swearing in of 13 new lieutenants. Twelve sergeants and one acting lieutenant were promoted Tuesday by Jordan and their appointments are to become effective at 2 p.m. today.

Judge Freedman will be asked to enjoin Kountz from certifying any new promotion lists for the department. According to the complaint, a new eligibility list for sergeants, based on an examination given on Feb. 12, 1977, is forthcoming.

The application also requests that the defendants be restrained from "destroying written examinations, exam papers, or any other records of the results of any of the procedures used for processing candidates for promotion...."

Celester, 34, who was appointed Boston Penal Commissioner by White last September, and is on leave of absence from the police department, alleges he has been denied the same promotional opportunities afforded white officers.

The nine-year police veteran received a score of 80 percent when he took a sergeant's exam in 1974 and was among 200 white and five black patrolmen who became eligible for promotion. The passing score is 70 percent. As a result of that exam, 104 white were promoted and only two blacks. Howard, 35, received a 75 percent score and improved his score to 78 in the 1977 test. Celester failed the 1977 exam, scoring a 62 percent.

As evidence of the denial of promotion to black policemen, the plaintiffs point out that of 278 sergeants only three are black, two of whom serve as deputy superintendents; of 65 lieutenants and 25 captains, none is black and there are no blacks assigned to the Homicide, General Investigations (Robbery), Hackney or Organized Crime Units.

Of the 248 detectives, only 11 are black. One black is assigned to the vice squad, but there are no blacks in provisional positions or serving as detective sergeants, detective lieutenants or as one of the four superintendents.

The plaintiffs allege that as a result of the defendants' actions, not only in civil service promotions but in non-civil service appointments (detective ratings), they "and the class they represent have been deprived of income in the form of wages and of prospective retirement benefits, Social Security and other benefits due them as employees solely because of their race and color. . . ."

As relief, the plaintiffs seek the promotion of Celester and Howard and all appropriate members of the class, a plan to redress past discrimination against Boston police officers through priority promotion of qualified black officers and reimbursement of lost pay, benefits and training opportunities.

A spokesman for the Boston Police Department said the department learned of the case late yesterday and had no comment yet.

Appendix J

MASSACHUSETTS GENERAL LAWS CHAPTER 31, § 25

The administrator shall establish, maintain and revise lists of persons who are eligible for appointment to positions in the official service. The names of such persons shall be arranged on each such list, subject to the provisions of section twenty-six, where applicable, in the order of their marks on the examination based upon which the list is established. Each such list shall be established or revised as soon as such marks are determined by the administrator, except that if such determination is made by the use of a written examination, the establishment or revision of the list shall be completed no later than six months after the date of such examination. The administrator shall make all eligible lists available for public inspection. All persons who have taken an examination shall be notified of the results thereof not later than sixty days after the date of such examination.

If an examination is held for a position and the results are determined during the period of eligibility on a list for such position of persons who have taken a previous examination of the same type, the names of all persons who passed such examinations shall be consolidated in a single list. Eligibility of a person for placement on, and the standing of such person on, an eligible list for any position shall be determined by the results of the last examination taken by such person for such position.

Persons on an eligible list shall be eligible for certification from such list for a period not to exceed two years unless one of the following exceptions applies: (1) such eligibility is extended by law because such persons are in the military or naval service; (2) the administrator is temporarily enjoined by a court order from certifying names from an eligible list, in which case eligibility of persons on such list shall be extended for a period equal to the duration of such order; (3) the ad-

ministrator determines that the public convenience requires an extension of eligibility, in which case eligibility of all persons on such list shall be extended until such time as a new eligible list is established for the same position for which the original list was established; or (4) the administrator reestablishes an expired eligible list pursuant to the provisions of the following paragraph.

The administrator shall reestablish the eligibility of all persons on an eligible list for a position in a departmental unit in order to fill a vacancy in such position which occurs as a result of a death or retirement if such persons were eligible to be certified for appointment to such position at the time such vacancy occurred and requisition to fill such vacancy is made not later than six months after such death or retirement.

Following the certification of names to an appointing authority, such appointing authority shall submit a written notice to the administrator indicating, with respect to each person whose name was certified, whether such person appeared to be interviewed, declined to accept employment, or expressed his willingness to accept employment, and whether or not such person has been selected for appointment. Failure to submit such notice on or prior to the date of expiration of the eligibility of a person on the list from which such names were certified shall nullify an appointment of such person.

The name of a person which was placed on an eligible list as the result of an examination for original appointment shall be removed from such list if the person fails to respond to a notice of certification or refuses to accept permanent or temporary employment after having previously expressed willingness to accept such employment, provided that the administrator may permit the name of such person to remain on the eligible list if such person submits to the administrator, during the period of his eligibility on such list, a satisfactory explanation of such refusal or failure to respond, and provided, further, that any person whose name is certified three times

from an eligible list and who refuses, in each instance, to accept employment which he had previously expressed willingness to accept shall be ineligible to have his name certified again from such list for such employment.

Appendix K

MASSACHUSETTS GENERAL LAWS CHAPTER 31, § 31

An appointing authority may, without submitting a requisition to the administrator and without complying with other provisions of the civil service law and rules incident to the normal appointment process, make an emergency appointment to any civil service position other than laborer for a total of not more than thirty working days during a sixty day period. Such appointment shall be made only when the circumstances requiring it could not have been foreseen and when the public business would be seriously impeded by the time lapse incident to the normal appointment process. Upon making such an appointment, the appointing authority shall immediately notify the administrator in writing, in such form and detail as the administrator may require, of the reason for the appointment and the expected duration of the employment thereunder. No renewal of such emergency appointment shall be made without the consent of the administrator.

An emergency appointment may, upon written request of the appointing authority and with the consent of the administrator, be renewed for an additional thirty working days. The administrator shall not consent to more than one such renewal of the appointment unless the position is in a department, institution or hospital carrying out functions connected with the public safety or public health and the public service would suffer if a second renewal were not granted, in which case the administrator may consent to a second renewal. No person shall receive more than one such appointment or one such appointment and renewal, as the case may be, in any twelve month period, except as otherwise provided in this section.

Supreme Court, U.S.
FILED
APR 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1592

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS BURKE, et al.,

Petitioners,

v.

MASSACHUSETTS ASSOCIATION OF
AFRO-AMERICAN POLICE, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF STATE RESPONDENT-APPELLEE IN OPPOSITION

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Carl Valvo*
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QUESTION PRESENTED

Whether this Court's opinion in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), effected such a clear change in Title VII law that a trial judge abused his discretion by denying non-minorities intervention to contest an affirmative action consent decree in federal district court.

PARTIES

This Brief in Opposition is submitted on behalf of the State Respondent-Appellee, the Department of Personnel Administration of the Commonwealth of Massachusetts.

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No. 85-1592

IN THE
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THOMAS BURKE, et al.,

Petitioners,

v.

MASSACHUSETTS ASSOCIATION OF
AFRO-AMERICAN POLICE, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF STATE RESPONDENT-APPELLEE IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit (Pet. A1-A8) is reported at 780 F.2d 5 (1st Cir. 1985). The opinion of the District Court (Pet. A9-A19) is reported at 106 F.R.D. 80 (D. Mass. 1985).

JURISDICTION

The judgment of the Court of Appeals affirming the order of the District Court was entered on December 20, 1985. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case presents a question of the correct interpretation of the remedial provisions of Title VII of the Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C. § 2000e-5(g) ("Section 706(g)"), reproduced in the petition for certiorari at A22-A24.

STATEMENT OF THE CASE

Petitioners, officers in the Boston Police Department, moved to intervene in the District Court for the express pur-

pose of vacating a consent decree entered in 1980 in Massachusetts Association of Afro-American Police, et al. v. Boston Police Department, et al., C.A. No. 78-529-Mc (D. Mass.). The purpose of the consent decree is to insure the implementation of an affirmative action plan for promoting minority police officers to the rank of sergeant in the Boston Police Department after the administration of a civil service promotional examination, the contents of which are demonstrably free of racial bias.

On March 2, 1978, plaintiff Massachusetts Association of Afro-American Police, Inc. ("MAAAP") commenced this action alleging a pattern of discrimination in the promotional practices of the Boston Police Department in violation of the Civil Rights Act of 1871, 42 U.S.C.

§ 1983, the Civil Rights Act of 1870, 42 U.S.C. § 1982, Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq., and provisions of the laws and Constitution of the Commonwealth of Massachusetts. (Opposition of Co-respondents ("Opp.") A21-A45). After more than two years of discovery and negotiations, the litigation was settled in principle on July 9, 1980, by a proposed consent decree agreeable to all the parties. (Opp. A3-A8).

Considerable publicity preceded the announcement of the proposed settlement. (Opp. A74-A79). Prior to a hearing on the proposal,[1/] four white Boston police officers moved to intervene to

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1/ Inasmuch as the litigation was styled as a class action, the proposed settlement required notice to the putative class prior to court approval. See Fed. R. Civ. P. 23(e).

protect their purported interest in being promoted to sergeant. Their motions were denied on July 9, 1980, and on September 16, 1980, the District Court approved the consent decree and entered it as an order. (Opp. A9).

The consent decree provided for the establishment of validated promotional procedures for the implementation of the Boston Police Department's pre-existing affirmative action plan and for the establishment of goals and timetables for the promotion of blacks to the position of police sergeant. (Opp. A3-A9). As to the content and administration of the civil service promotional examination itself, the Department of Personnel Administration of the Commonwealth of Massachusetts ("DPA") was to supervise the police department's preparation of an

examination which conformed to the "Uniform Guidelines on Employee Selection Procedures," 29 C.F.R. §§ 1607.1 et seq., or was otherwise demonstrably free of racially discriminatory impact. (Opp. A5-A7). The consent decree further provided for training opportunities for those preparing for the promotional examination with guarantees of equal access to such training for minority candidates. (Opp. A6).

On July 25, 1984, four years after the entry of the consent decree and six years after the commencement of the litigation, the instant petitioners sought to intervene in the District Court.[2/] (Opp. A66-A68). The petitioners at-

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2/ The present petitioner group contains three of the four officers whose motions

(footnote continued)

tempted to distinguish this latest effort to intervene from past, rejected efforts by citing the purported change in the law occasioned by this Court's decision in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). The petitioners contended before the District Court that Stotts "held that the remedial authority of the trial court under Title VII is limited to actual victims of defendants (sic) unlawful discrimination" and, accordingly, the District Court "lacked subject matter jurisdiction under that Title to adopt the Consent Decree absent a finding that any of the plaintiffs had been a victim of defendants

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(footnote continued)

to intervene had been rebuffed by the District Court previously, in 1980. (Pet. A7).

(sic) discrimination." (Pet. A13-A14).

The District Court found the petitioners' interpretation of Stotts "far too broad", limited Stotts to its facts, and denied petitioners' application for intervention on May 28, 1985. (Pet. A14-A18).

On December 20, 1985, the Court of Appeals entered judgment affirming the District Court. (Pet. A20). The Court of Appeals noted that petitioners' claim rested upon the assertion that the consent decree is barred by Title VII, as interpreted by this Court in Stotts. The Court of Appeals also noted that it only recently had rejected "this same claim in a similar case with a similar decree imposing similar affirmative action promotion requirements" (Pet. A3) in Deveraux v. Geary, 765 F.2d 268 (1st

Cir. 1985), petition for cert. docketed, September 19, 1985, No. 85-492. Finding no significant distinction between petitioners' case and Deveraux, the Court of Appeals affirmed the order of the District Court. (Pet. A1-A8, A20).

REASONS FOR DENYING THE WRIT

Petitioners assert that this Court's decision in Firefighters Local Union No. 1784 v. Stotts, supra, effected such a significant change in Title VII law that their intervention is justified in this eight year old litigation in order to vacate a six year old consent decree entered by the District Court. This Court, however, has granted certiorari and has heard argument in three other cases this Term which are likely to resolve the precise legal issues raised in the instant

petition. Moreover, this Court currently is considering a petition for a writ of certiorari to the Court of Appeals for the First Circuit in Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985), a case which that court found to be virtually indistinguishable from the instant case. Accordingly, it is unnecessary to review this case which raises issues which will be addressed in three, and perhaps four, other cases this Term.

I. THE OPINION OF THE COURT OF APPEALS THAT THERE HAS BEEN NO CLEAR CHANGE IN TITLE VII LAW IS CONSISTENT WITH THE OPINIONS OF ALL COURTS OF APPEALS ADDRESSING THE ISSUE, INCLUDING THOSE CASES IN WHICH CERTIORARI HAS BEEN GRANTED THIS TERM.

In Deveraux v. Geary, supra, a case which the Court of Appeals finds indistinguishable from the instant case (Pet. A3), the court said, "Stotts (which dealt

with a different situation) does not make it clear that the challenged consent decree is no longer lawful. The weight of circuit authority construes Stotts as not invalidating such a decree." 765 F.2d at 269. Inasmuch as Stotts does not so clearly constrict a federal court's remedial authority under Title VII, the Court of Appeals was correct in rebuffing petitioners' effort to intervene to vacate the consent decree on those grounds.

Petitioners' only authority purportedly to the contrary is a law review commentary musing about the "potentially sweeping implications" of Stotts or its progeny. (Pet. 5, 19). Seven circuit courts have considered the issue and all seven have declined to find such sweeping implications. Thus, the Court of Appeals

followed the lead of every other circuit court considering a Stotts challenge to an existing consent decree and limited Stotts to its facts. See Deveraux, 765 F.2d at 274; Turner v. Orr, 759 F.2d 817, 823-26 (11th Cir. 1985); EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers International Association, 753 F.2d 1172, 1186 (2d Cir.), cert. granted, 106 S. Ct. 58 (1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 486 (6th Cir.), cert. granted sub nom., Local No. 93, International Association of Firefighters v. City of Cleveland, 106 S.Ct. 59 (1985); Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1360 n. 5 (9th Cir. 1985); Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984); Wygant v. Jackson Board of Education, 746 F.2d 1152, 1157-58 (6th Cir. 1984),

cert. granted, 105 S.Ct. 2015 (1985); Kromnick v. School District of Philadelphia, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, 105 S.Ct. 782 (1985); Grann v. City of Madison, 738 F.2d 786, 795 n. 5 (7th Cir), cert. denied, 105 S.Ct. 296 (1984).

Significantly, this Court has granted certiorari and has heard argument in three of the above-cited cases this Term. In Local No. 93, International Association of Firefighters, supra (No. 84-1999; argued on February 25, 1986), a union challenged an affirmative action consent decree entered in settlement of class action litigation, asserting that it penalized innocent non-minority firefighters in contravention of the Fourteenth Amendment. Analyzing the merits of the claim under Title VII, the Sixth

Circuit held that the plan embodied in the consent decree would be valid if it was reasonably related to the objective of remedying prior discrimination, allowed only qualified minorities to be hired or promoted, did not require the discharge and replacement of non-minority workers or create an absolute bar to their advancement, and was temporary in nature and terminated when the underrepresentation of minorities had been corrected. 753 F.2d at 484, citing, Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983). The consent decree in the instant case meets those same indicia of validity.

Moreover, the Sixth Circuit went on to hold that Stotts was distinguishable as a matter of law, since it involved a court order entered over the objections

of the public employer and outside the scope of the consent decree itself. 753 F.2d at 486. Examining the extent to which Stotts may have defined the remedial relief available under section 706(g) of Title VII, the Sixth Circuit concluded that while Stotts clearly limits the relief which a court may order, it does not forbid an employer from entering into a consent decree. Id. at 487.

Similarly, in Wygant, supra (No. 84-1340; argued on November 6, 1985), the same circuit court upheld a voluntary race-conscious affirmative action plan developed during the collective bargaining process. Stating the majority in Stotts "specifically declined" to decide the validity of such a plan, 746 F.2d at 1158, the court found that it did not

violate the equal protection clause or Title VII even in the absence of direct findings of discrimination.

In Local 638, supra (No. 84-1656; argued on February 25, 1986), the trial court's imposition of an affirmative action plan on a union after trial was affirmed by the Second Circuit. That court rejected the argument "that Stotts eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination." The court distinguished Stotts on the grounds that its discussion of § 706(g) related only to "make whole" relief ordered by the district court, and did not address the type of prospective relief ordered in Local 638. 753 F.2d at 1185-1186.

Inasmuch as the three cases now under advisement in this Court may have a pro-

found effect on the merits of this and other cases, and inasmuch as this Court has the opportunity to address the legal issues raised by the petition in the three cases now under review, the writ of certiorari should be held in abeyance pending this Court's determination of those cases.

II. THE INSTANT PETITION PRESENTS NO NEW LEGAL ISSUES WHICH THE COURT COULD NOT ADDRESS IN DEVERAUX, SHOULD IT DEEM CERTIORARI TO BE APPROPRIATE IN THAT CASE.

On September 19, 1985, five white police lieutenants asked this Court to issue a writ of certiorari to the Court of Appeals for the First Circuit in Deveraux, supra (No. 85-492). The Deveraux respondents, represented as here by the Massachusetts Attorney General, suggested that this Court's decision on

the petition should be held pending decisions in the three cases which have been heard this Term. Thus far, this Court has not acted on the Deveraux petition. The state respondent suggests that the decision on this petition may be similarly deferred, particularly because the pending Deveraux petition itself provides an additional reason to hold this matter.

Should it become necessary to hear the Deveraux case in addition to the other three cases heard this Term, Deveraux itself will present for the Court's consideration all the legal issues purportedly arising in the instant petition. Accordingly, a writ of certiorari in the instant case at this time would be duplicative and unnecessary.

In Deveraux the Court of Appeals held that Stotts did not invalidate an affir-

mative action consent decree of the type now at bar because 1) the Stotts decree directly conflicted with a bona fide seniority system while the Deveraux decree did not; 2) in Stotts the district court ordered changes in the decree over a party's objections while in Deveraux only the original terms, to which the parties agreed, were enforced; 3) the Stotts decree, being involuntary, fell outside the scope of United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (holding that Title VII does not forbid private employers from voluntarily entering into affirmative action agreements to eliminate manifest racial imbalance), while the Deveraux decree was more like a Weber agreement and; 4) the Stotts defendant had not admitted prior Title VII violations while the Deveraux defendant

did make such admissions. See Deveraux, 765 F.2d 273-74; Pet. A3. In the instant case, the same Court of Appeals correctly stated, "The dispositive legal question before us now is whether this case differs significantly from Deveraux." (Pet. A3).

The Court of Appeals properly found that there is no significant difference between this case and Deveraux. The only distinguishing feature, and the only difference petitioners argue to this Court, is that the Deveraux consent decree contained an admission that the public employer had violated Title VII, while the Boston Police Department made no such concession in this case. (Pet. 6-7, A3). The Court of Appeals correctly dismissed this distinction as insignificant and found that the public employer's admis-

sion of past Title VII violations was not necessary to the result in Deveraux. (Pet. A3). Moreover, the Court of Appeals noted that decisions of other circuits, on which it relied in deciding Deveraux, for the most part did not rely on an employer's admission of Title VII violations. (Pet. A3-A4). Finally, the Court of Appeals stated that it was not aware of any legal theory which would justify allowing Title VII consent decrees to stand or fall depending upon "whether the parties had bothered to negotiate an 'admission' as part of their consensual settlement of the suit. Thus, we find Deveraux dispositive of the present appeal." (Pet. A4).

The Court of Appeals was plainly correct in finding this case indistinguishable from Deveraux. Where this Court is

holding a petition for certiorari in that identical case pending the disposition of three similar cases heard this Term, an additional writ of certiorari in this case would be redundant and would serve no useful purpose.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be held by this Court pending its decisions in Local No. 93, Wygant, and Local 638 and its disposition of the petition in Deveraux.

Respectfully submitted,

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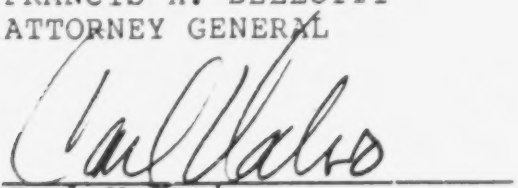
ATTORNEY GENERAL



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